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No._____

IN THE

Supreme Court of the United States

October Term, 1982

TED SIMON, *et al.*,

vs.

WILLIAM R. DAVIS, Secretary of the Commonwealth of Pennsylvania and RICHARD THORNBURGH, Governor of the Commonwealth of Pennsylvania.

On Appeal From the United States District Court for the Middle District of Pennsylvania.

JURISDICTIONAL STATEMENT

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Questions Presented

1. Whether the Constitution, while permitting political considerations, in any way limits political gerrymandering?

2. Whether Article I, §2 or the First Amendment right of the people "to petition the Government for a redress of grievances" require that congressional districts be sufficiently compact and contiguous so that meaningful relationships exist between Representatives and the represented, and that the votes of citizens are not diluted?

3. Whether the freedom of association recognized for members of organizations and political parties exists for voters?

4. Whether the district court erred in not striking down a legislative reapportionment plan with excessive population deviations?

Parties Below

Appellants Ted Simon, John Regoli and Robert H. Miller are registered voters, taxpayers, residents and the members of the Board of County Commissioners of Westmoreland County, Pennsylvania. Clarence H. Carns, Joseph H. Deeds and Leon T. Smithley are registered voters, taxpayers, residents and the members of the Board of Supervisors of Ligonier Township, County of Westmoreland, Pennsylvania. John E. St. Clair and Homer G. Burkett are registered voters, taxpayers, residents and members of the Board of Supervisors of Fairfield Township, County of Westmoreland, Pennsylvania. Appellants were plaintiffs in the proceedings in the district court.

Other plaintiffs below in these consolidated suits included a group of state senators, Congressman Doug Walgren, Jesse DelGre, Anna Miller and Alfred Ford. These plaintiffs have not appealed.

Appellees William R. Davis, Secretary of the Commonwealth of Pennsylvania, and Richard Thornburgh, Governor of the Commonwealth of Pennsylvania, were defendants in the district court. Appellees Lawrence Coughlin, Gus Yatron, Bud Shuster, William F. Goodling, Austin J. Murphy, Robert S. Walker, William F. Clinger, Jr., Donald L. Ritter, James K. Coyne and Thomas M. Foglietta, Members of Congress from Pennsylvania, were defendant-intervenors in the district court.

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JURISDICTIONAL STATEMENT

Opinion Below

The opinion of the three-judge district court, App. A, *infra*, is not yet reported. The opinion of the three-judge district court denying a preliminary injunction, App. B, *infra*, is reported at 535 F.Supp. 191 (M.D.Pa. 1982).

Jurisdiction

Appellants were plaintiffs in one of a number of actions brought in the United States District Court for the Middle District of Pennsylvania to enjoin the Pennsylvania Congressional reapportionment, Act 42 of 1982 as a violation of Article I, Section 2, the First Amend-

ment, and the Fourteenth Amendment of the United States Constitution. The cases were consolidated and a three-judge court was properly convened pursuant to 28 U.S.C. §2284(a). On March 23, 1982 the three-judge court denied a request for a preliminary injunction, App. B, *infra*. On September 13, 1982 the three-judge court held that the Pennsylvania Congressional reapportionment was not unconstitutional, denied plaintiffs' request for a permanent injunction, and entered judgment for the defendants. Appellants filed a notice of appeal in the district court on October 13, 1982, App. C, *infra*.

The jurisdiction of this Court is conferred by 28 U.S.C. §1253.

Constitutional Provisions and Statutes Involved

Article I, Section 2 of the Constitution of the United States in pertinent part:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.
>
> No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.
>
> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers. . .

Amendment I of the Constitution of the United States:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to

assemble, and to petition the Government for a redress of grievances.

Amendment XIV, Section 1 of the Constitution of the United States:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 25 P.S. §2621, Powers and Duties of the Secretary of the Commonwealth in pertinent part:

> (c) To certify to county boards of elections for primaries and elections the names of the candidates for President and Vice-President of the United States, presidential electors, United States senators, Representatives in Congress and all state offices, including senators, representatives, and judges of all courts of record, and delegates and alternate delegates to National conventions, and members of state committees, and the form and wording of constitutional amendments or other questions to be submitted to the electors of the state at large.

Title 25 P.S. §2865, Secretary of the Commonwealth to notify county board of certain nominations to be made:

> On or before the thirteenth Tuesday preceding each primary, the Secretary of the Commonwealth shall send to the county board of each county a written notice designating all the offices for which candidates are to be nominated therein, or in any district of which such county forms a part, or in the State at large, at the ensuing primary, and for the nomination to which candidates are required to file nomination petitions in the office of the Secretary of

> the Commonwealth, including that of President of the United States; and shall also in said notice set forth the number of presidential electors, United States Senators, Representatives in Congress and State officers, including senators, representatives and judges of courts of record, to be elected at the succeeding November election by a vote of the electors of the county, or of any district therein, or of any district of which such county forms a part.

Title 25 P.S. §3159, Secretary of the Commonwealth to tabulate, compute and canvass returns:

> Upon receiving the certified returns of any primary or election from the various county boards, the Secretary of the Commonwealth shall forthwith proceed to tabulate, compute and canvass the votes cast for all candidates enumerated in section 1408, and upon all questions voted for by the electors of the State at large, and shall thereupon certify and file in his office the tabulation thereof.

Title 25 P.S. §3163. United States Senators, Representatives in Congress; certificates of election; returns:

> Upon completing the tabulation of any election for United States senator or representative in Congress, the Secretary of the Commonwealth shall lay the same before the Governor, who shall immediately issue certificates of election under the seal of the Commonwealth, duly signed by himself, and attested by the Secretary of the Commonwealth, and deliver the same to the candidates receiving the highest number of votes for the respective offices. The Governor shall also transmit the returns of such election to the President of the United States Senate, in the case of the election of a United States Senator, and to the Speaker of the House of Representatives of the United States, in the case of the election of representatives in Congress.

The Pennsylvania reapportionment statute, Act 42 of 1982, is lengthy. It is set forth as Appendix D to this Jurisdictional Statement.

Statement of the Case

On March 3, 1982 Pennsylvania Governor Richard Thornburgh signed Act 42 of 1982, which the General Assembly had adopted as the reapportionment plan for the election of United States Representatives, App. D, *infra*. That plan, based on the 1980 decennial census, reduced the number of Pennsylvania congressional districts from twenty-five to twenty-three, App. A, 2a.

One of the consequences of the reapportionment of congressional districts by the legislature was that Westmoreland County, which was historically the hub of one congressional district, was divided among three congressional districts, App. A, 22a. The district court recognized that the plight of the citizens of Westmoreland County was caused by the legislature's "decision to tailor the congressional districts to provide some assistance to a Republican incumbent . . .", App. A, 23a. Further, the three-judge district court noted that Westmoreland County's incumbent Congressperson was pitted against another incumbent Congressperson, and that both were Democrats.

Four lawsuits were filed as a result of the passage of Act 42 of 1982. Plaintiffs alleged, *inter alia*, that the redistricting plan lacked the required numerical equality; that the voting strength of blacks had been diluted; and that the gerrymandering of Westmoreland County deprived its residents and voters of First Amendment guarantees of the people's right to petition the government for redress of grievances, and Fourteenth Amendment guarantees of equal protection of the fundamental right to vote. Plaintiffs also alleged that the legislature failed to meet the "good-faith" requirement of *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969).

Plaintiffs in the four suits sought a preliminary injunction to delay the primary election for members of the United States House of Representatives. The cases were consolidated as *In re Pennsylvania Congressional Districts Reapportionment Cases,* and a number of incumbent Congresspersons were permitted to intervene as defendants. A three-judge district court denied the request for a preliminary injunction. See App. B, *infra.*

The case was submitted for trial on depositions, affidavits and exhibits with some limited testimony. On September 13, 1982 the three-judge district court denied plaintiffs' request for a permanent injunction, and dismissed the complaint. App. A, *infra.*

The court below concluded that "Westmoreland County was the victim of gerrymandering." App. A, at 23a. Nevertheless, despite the absence of a dispositive decision, the court read the opinions of the United States Supreme Court as requiring judicial deference to partisan districting decisions and refused to grant relief. See App. A, at 23a-24a.

Plaintiffs from Westmoreland County, whose original suit was captioned *Ted Simon, et al. v. William R. Davis, et al.,* now appeal to this Court pursuant to 28 U.S.C. §1253.

THE QUESTIONS ARE SUBSTANTIAL

1. The Case at Bar Raises the Vital Issue Whether the Constitution, While Permitting Political Considerations, in Any Way Limits Political Gerrymandering in Congressional Districting.

Since *Baker v. Carr*, 369 U.S. 186 (1962) and *Wesberry v. Sanders*, 376 U.S. 1 (1964), federal courts have reviewed numerous congressional reapportionment plans. The first case involving congressional redistricting stated that "equal representation for equal numbers of people [is] the fundamental goal for the House of Representatives." *Wesberry v. Sanders, supra*, at 18.

Subsequent decisions of this Court have focused on the requirement that congressional districting must result from the State's "good-faith effort to achieve precise mathematical equality," absent a vital justification. *Kirkpatrick v. Preisler*, 394 U.S. 526, 530 (1969). See also *White v. Weiser*, 412 U.S. 783 (1973). These cases involve an interpretation of Article I, §2 of the United States Constitution. This Court has concluded that political considerations may be taken into account in redistricting plans. *Gaffney v. Cummings*, 412 U.S. 735 (1973). This Court has, however, never decided if the Constitution, either because of Article I, §2, the First Amendment, or the equal protection clause of the Fourteenth Amendment, establishes any limits on States when congressional districts are created.

Appellants do not dispute that political considerations are an integral part of redistricting. They do contend, however, that legislative majorities may not ignore the Constitutional rights of large numbers of their citizens in devising reapportionment plans. As Justice Brennan said in *Kirkpatrick v. Preisler, supra*, at 533 "problems

created by partisan politics cannot justify an apportionment which does not otherwise pass constitution muster." While it is true that attention to county and municipal boundaries cannot justify failure to achieve equality of population between districts, *Id.*, at 534, it should not be possible for States to construct congressional districts which are illogical, irrational, and are not in any sense political communities with any meaning. Legislative majorities should not be able to protect the interests of a few politicians at the expense of hundreds of thousands of citizens and voters.

In the case at bar, the district court realized that Westmoreland County had historically been the hub of a congressional district, and that the County was divided into parts of three districts by the passage of Act 42 of 1982, which established congressional district boundaries. App. A, 22a. The court below also noted that Westmoreland County's population increased by 4.1 per cent between 1970 and 1980, and that it was the sixth most populous county in Pennsylvania. The three-judge court also found that while Westmoreland County would constitute 76 per cent of an "ideal congressional district," the County now constitutes only 31.1 per cent of the 20th district, 49.3 per cent of the 12th district, and only 2.4 per cent of the 4th district. App. A, 47a.

The court felt that it was "obvious" that Westmoreland County's plight resulted from an effort to assist a Republican incumbent in the forthcoming congressional election. App. A, 22a-23a. The court's reference here is to Congressman Eugene Atkinson, whose interests resulted in the grotesquely shaped 4th congressional district. That district includes parts of six counties of Pennsylvania, and stretches from the Ohio border almost to the center of the State. As a con-

sequence, the Ligonier Valley area of Westmoreland County is isolated from the rest of the County, and is part of a gerrymandered district with which it has nothing in common. In the words of a Westmoreland County official, residents of the Ligonier Valley would have to drive almost one hundred miles to see their Representative "and there have their problems heard by a Congressman who would owe his allegiance to his home area." Affidavit of Testimony of Robert H. Miller, P.1.

It should be noted that the situation is not in any sense changed by the results of the 1982 congressional election. Congressman Atkinson was defeated, but his successor resides in the same distant part of the 4th district that he did. It should also be emphasized that this suit was not brought by disgruntled partisans of the minority party in the Pennsylvania General Assembly to overturn the actions of the majority party. To the contrary, the majority of the plaintiffs in *Ted Simon, et al. v. William Davis, et al.*, are registered Republicans, and the legislative majority in the General Assembly when Act 42 of 1982 was passed was Republican.

Act 42 of 1982 also took part of Westmoreland County and placed it in the 12th congressional district, with three largely rural counties to the east. Expert testimony submitted to the three-judge court indicated that socially, economically, geographically and politically the gerrymandered part of Westmoreland County had no common interests with the rest of the 12th congressional district. Affidavit of Michael S. Margolis, PP. 9-10; submitted examination of Larry J. Larese, PP. 3-4.

The remainder of Westmoreland County was combined with parts of Allegheny County to the west to form the 20th congressional district. To quote the court below,

"In sum, Westmoreland County was the victim of gerrymandering." App. A, 23a.

The case at bar thus affords this Court an opportunity to directly and dispositively address the issue of political gerrymandering. In other contexts, this Court has established the principle that legislative majorities cannot enact legislation which tramples the Constitutional rights of citizens. For example, this Court has held that a state legislature may not establish religion in the public schools. *Epperson v. Arkansas*, 397 U.S. 97 (1968). Nor may a state require segregation of the races in the public schools. *Brown v. Board of Education*, 347 U.S. 483 (1954). *Baker v. Carr*, *supra* and its progeny establish that reapportionment issues are justiciable, and it is illogical to require equality of population in districting, yet permit gerrymandering "to violate the principle of equal voting." H. MAYO, AN INTRODUCTION TO DEMOCRATIC THEORY, at 134 (1960).

This Court has already recognized that equality of population is not enough if other important issues are involved. Districting which serves to exclude blacks from a municipality has been held invalid. *Gomillion v. Lightfoot*, 364 U.S. 399 (1960). An at-large system of elections for county commissioners has only recently been held violative of the equal protection clause of Amendment XIV where discriminatory intent was shown. *Rogers v. Lodge*, 73 L.Ed.2d 1012 (1982).

Decisions of this Court dating back to the last century have established that voting is "a fundamental right, because preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Almost this exact language was used by this Court in a leading reapportionment case. See *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). When state

action results in impairment of the fundamental right to vote, the equal protection clause of Amendment XIV is involved, and strict scrutiny analysis has been utilized. *Kramer v. Union School District*, 395 U.S. 621, 626 (1969). Thus, this Court could invoke the protections of the equal protection clause for a political gerrymander of the nature of that perpetrated on the citizens, taxpayers and voters of Westmoreland County is state action which denies Constitutional rights just as effectively as a refusal to reapportion at all does. *Baker v. Carr, supra.* As District Judge Caleb M. Wright wrote in 1967:

> Concededly, gerrymandering is fairly deep in the "political thicket." Nevertheless, to allow a legislature to deprive any group of fair representation in any manner would be to condone invidious discrimination . . ., Since the discrimination worked by partisan gerrymandering is as sinister as that worked by malapportionment—both operate to nullify the voting power of certain elements of the citizenry—it would seen that the rationale of *Baker v. Carr* requires that those whose votes are debased by partisan gerrymandering be afforded the protection of the Fourteenth Amendment.

Sincock v. Gately, 262 F.Supp. 739, 857 (D.Del. 1967) (Wright, J., concurring in part and dissenting in part).

Whether this Court address the issue of gerrymandering of congressional districts in the context of Article I, §2 of the United States Constitution, or the equal protection clause of Amendment Fourteen, legislative majorities should not be permitted to serve the interests of the few at the expense of the majority of citizens and voters. Gerrymandering of the nature present in the case at bar dilutes votes and renders elections form without substance.

2. Article I, §2 or the First Amendment Right of the People "to petition the Government for a redress of grievances" Require That Congressional Districts be Sufficiently Compact and Contiguous So That Meaningful Relationships Exist Between Representatives and the Represented, and That the Votes of Citizens Are Not Diluted.

This Court has never held that congressional districts must be compact and contiguous. *Kirkpatrick v. Preisler, supra.* But the earlier cases involved situations where legislative majorities were trying to justify the avoidance of the Court's requirement of equality of population in congressional districting. Thus, the earlier cases are distinguishable from the case at bar.

In *Kirkpatrick,* the Court rejected the State of Missouri's contention that variation from population equality is permissible if such variances result from an effort to "avoid fragmenting political subdivisions by drawing congressional district lines along existing county, municipal, or other political subdivision boundaries." *Id.,* 533-34. The court below, in evaluating plaintiffs' claims, failed to see that *Ted Simon, et al.* are in a situation the opposite of the one in *Kirkpatrick.* In the case at bar, plaintiff-appellants do not dispute the necessity to have equal population of congressional districts. Rather, appellants contend that the districts of equal population must provide a meaningful relationship between the elected Representative in Congress and those who are supposed to be represented.

Justice White, writing for the Court, recognized the importance of both compactness *and* population equality, characterizing them as "sound districting principles. . . ." *United Jewish Organizations of Williamsburgh v. Carey,*

430 U.S. 144, 168 (1977). Social scientists who have studied apportionment plans, representation and democratic theory concur. In the court below, appellants submitted expert testimony on these matters, but the court failed to address them.

A leading authority on legislatures and representation, Professor Malcolm E. Jewell, suggests a number of reasons to maintain county lines in districting within the context of population equality. First, it is obvious that "residents of counties and cities have certain common interests and needs. . . ." M. JEWELL, Commentary, in REAPPORTIONMENT IN THE 1970'S, at 47 (N. Polsby ed. 1971). Districting which destroys political, socioeconomic and geographic communities destroys the natural relationship between legislators and constituents.

Secondly, democratic theory holds that elections are to be conducted so that representatives are accountable to their constituents. But if districting destroys natural communities, the Congresspersons elected are not salient or even known to the electors, making elections meaningless rituals which serve no purpose and undermine the democratic system. Writing in 1971, Professor Jewell's words apply to the situation in the case at bar. He stressed that "If these legislators are elected from districts that are unrelated to familiar city and county boundaries, they are likely to be even less visible to the voters. The visibility of legislators is not a trivial problem, but is *central to the functioning of a representative system. Id.* (emphasis supplied.)

In the court below, appellants submitted expert testimony from a University of Pittsburgh political scientist on these matters. This expert concluded that the

gerrymandering of Westmoreland County created districts which were irrational, harmed the democratic process, and would adversely effect the political efficacy of citizens. Margolis affidavit. The expert witness concluded that one result of the gerrymander would be reduced voting turnout. *Id.*, at 8. As this expert commented, if equality of population is the only criterion for voting with no consideration of rational districting and the relationship between representative and represented then:

> One could meet the criterion of equal numbers by alphabetizing the list of residents of the state and apportioning the residents into 23 equal units. It would make no social or political sense, but it would satisfy the criterion of mathematically equal representation.
>
> *Id.*, at 11.

Geographers who have studied apportionment have reached similar conclusions. A geographer who has studied congressional redistricting concluded that focusing on "sterile adherence to only numbers" would lead to ignoring other factors vital to democratic representation. In his words, "the full identification and explanation of district characteristics. . . is essential to a good redistricting plan and an effectively constituted Congress." D. ORR, CONGRESSIONAL REDISTRICTING, at 119 (1970).

Appellants submitted to the court below testimony of a geographer about the Westmoreland County gerrymander. He said of the 4th district that:

> The district makes no sense from any features which would be used in establishing a region of common purpose or homogeneous area and functions. These areas overall are not tied together. There are

> no physiographic features which would establish this district formation and lacking commonality as a region, which is evidenced by the distance of miles of the district boundaries.
>
> Larese testimony, at 1.

As to the 12th district, this geographer testified that "These areas are not related. Westmoreland County is much different than Somerset or Cambria [counties]." *Id.*, at 2.

In *Hadley v. Junior College District*, 397 U.S. 50, 52 (1970) this Court asserted that voters have a Constitutional right not to have their votes "wrongfully denied, debased, or diluted." The effect of the gerrymandering of Westmoreland County is to debase and dilute the votes of its citizens in contravention of Article I, §2 and to render meaningless the First Amendment guarantee of petition of the Government for redress of grievances.

The leading case of *Kirkpatrick v. Preisler, supra*, while rejecting concern with any variable other than equality of population, stated that its rationale was that "Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives." *Id.*, at 531. In the case at bar, the voting power of Westmoreland County citizens has been debased, and they have suffered a diminution of access to elected representatives.

3. The Freedom of Association Recognized for Members of Organizations and Political Parties Exists For Voters.

In order to promote the important values of the First Amendment, this Court has recognized freedom of association as a Constitutional right. First recognized in cases involving organizations, see *NAACP v. Button*, 371 U.S. 415 (1963), it has been extended to provide that membership in political parties cannot be the basis for dismissal from public employment absent policymaking or confidential roles. *Elrod v. Burns*, 427 U.S. 347 (1976) (plurality opinion); *Branti v. Finkel*, 445 U.S. 507 (1980).

Appellants believe that freedom of association should also extend to political communities such as the residents of Westmoreland County. Professor Michael Margolis' affidavit defined political community as "a group of individuals who interact under an established set of political institutions which relate to them as a group and who have some subjective identification with those political institutions." Margolis Affidavit, at 3. This expert's testimony indicated that it was desirable that "as far as practicable it would make sense to preserve county boundaries in order that the citizens who might identify with the county as an entity might see that entity represented as a larger political community." *Id.*, at 5.

Maintenance of county boundaries, as far as permitted by the requirements of equality of population in districting, would facilitate effective representation, make congressional elections democratic and meaningful, and promote political efficacy thus increasing voting turnout. It is axiomatic "that persons who feel politically efficacious are more likely to vote than those who feel inefficacious. . . ." Abramson and Aldrich, The Decline of

Electoral Participation in America, 76 AMERICAN POLITICAL SCIENCE REVIEW 511 (1982).

Voters who are forced to vote for representatives in Congress who live far away from them, and who are from different social, economic, geographic and political communities can hardly be expected to find periodic elections meaningful or relevant. It is to be expected that voting turnout in Westmoreland County will be adversely affected by the gerrymander to which it has been subjected. Margolis Affidavit, at 8.

As one of the leading students of districting has observed:

> Without a fair opportunity to elect representatives, freedom of political association yields no policy fruits. Thus, First Amendment freedom of speech and of association as well as Fourteenth Amendment interests may be thwarted by discriminatory districting systems.

R. DIXON, DEMOCRATIC REPRESENTATION, at 499 (1968).

Despite the crucial importance of freedom of association, the court below failed to address the issue in its opinion. Furthermore, the court failed to address the implications of the gerrymander for political efficacy and citizen confidence in the system despite Justice Powell's statement in a case involving the electoral process that "preservation of the individual citizen's confidence in government" is a vital concern. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 789 (1978).

Thus, several important Constitutional issues raised by appellants in the court below were never considered by that court. The voters, citizens and taxpayers of Westmoreland County must look to this Court for vindication of their rights.

4. The District Court Erred In Not Striking Down A Legislative Reapportionment Plan With Excessive Population Deviations.

It is undisputed that *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969) remains the leading decision on congressional districting. That case requires a "good-faith effort to achieve precise mathematical equality." *Id.*, at 530-31. Although it has been suggested that this Court may be prepared to modify or abandon that standard, App. A, 14a, it has not yet done so.

Consequently, the three-judge district court erred in not striking down Act 42 of 1982 for violating the requirements of this Court's leading decision. The court below's opinion actually acknowledges the existence of plans with less population deviation. App. A, 15a.

Given the plight of the taxpayers, citizens and voters of Westmoreland County, the Court below's belief that promotion of constituency-representative relations justifies deviation from precise mathematical equality is most curious. App. A, 11a.

Conclusion

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

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December 12, 1982

APPENDIX

Opinion of the United States District Court for the Middle District of Pennsylvania.

IN THE UNITED STATES DISTRICT COURT

For the Middle District of Pennsylvania

In re PENNSYLVANIA CONGRESSIONAL DISTRICTS REAPPORTIONMENT CASES

Civil Action No. 82-0197

Before: WEIS, *Circuit Judge*
NEALON, *Chief District Judge*
RAMBO, *District Judge*

Filed
Harrisburg, Pa.
Sep 13 1982
Donald R. Berry Clerk
Per (initials illegible)
Deputy Clerk

WEIS, *Circuit Judge.*

This case presents us with the decennial issue of reapportionment. The plaintiffs challenge Act 42, which was enacted by the Pennsylvania General Assembly to reapportion the state's congressional districts in accordance with data derived from the 1980 census. The question before us is whether the evidence adduced requires us to tread our way through the political ticket or whether the facts permit us to exercise judicial restraint and stop at the edge. Although precise numerical equali-

ty was not achieved for each district, we conclude that there was sufficient compliance with the constitutional mandate so that judicial intervention is not required.

We earlier refused to issue a preliminary injunction which would have halted the primary elections. 535 F. Supp. 191 (M.D. Pa. 1982). We did so because of the imminence of the elections, and the lack of compelling statistical data on the extent of population deviation among the congressional districts under Act 42. However, the parties raised serious constitutional questions and expressed a desire to present a more complete record. Consequently, we scheduled a hearing on the request for a permanent injunction. Pursuant to our directions, the evidence in this proceeding was submitted largely in the form of affidavits and depositions, supplemented by in-court cross-examination of certain witnesses. We have also had the benefit of extensive argument and briefing by counsel.

The augmented record does not present substantially different relevant evidence from what was previously presented to us. For ease of reference, however, we will include in this opinion the dispositive factual matters from both hearings.[1]

In 1981, the Governor of Pennsylvania was advised by the President that, as result of the 1980 census, Pennsylvania was entitled to 23 seats in Congress. This represents a reduction of two seats and required the state's congressional districts to be reapportioned.

[1] We have attached, as an appendix, findings of fact derived from requests submitted by the parties. Those findings are in addition to, and must be as interpreted as consistent with, the factual matters in this narrative opinion.

Appendix A—Opinion of the United States District Court for the Middle District of Pennsylvania.

On March 25, 1981, the Census Bureau forwarded the official data from the 1980 census disclosing that the state's population is 11,866,728. Based on this figure, an ideal congressional district would contain 515,944 persons. Utilizing three statistics, the legislature began its reapportionment task. After considering and vigorously debating various plans, Act 42 was passed, and signed into law on March 4, 1982. It provides for 23 districts, the largest of which, the 21st, has 701 persons above the ideal number. The smallest, the Ninth, has 514 below that figure. The total numerical difference between the highest and lowest districts is 1215. Statewide, the average variation from the ideal figure is 253 persons, expressed in percentages as .0490%. The percentage of deviation between the largest and smallest district is .2354%.

On October 22, 1981, the Executive Director of the Pennsylvania Legislative Data Processing Center received revised information from the Census Bureau. The population figures for seventeen municipalities in the state were modified, but the data did not include a racial breakdown, as did the March 1981 figures. The October 1981 revisions were not communicated to the legislature by the Data Processing Center, and so did not form the basis for any of the reapportionment plans introduced in either the house or the Senate.

The revised census figures place the total state population at 11,863,895. Based on these figures, an ideal congressional district would include 515,822 persons. Applying the October revisions to Act 42, the largest district, the 21st, now has 824 persons above the ideal, while the

smallest, the 16th, has 1236 below. The numerical deviation between the high and low districts is 2,060. Statewide, the average variation is 364 persons—an average percentage of .0700%. The difference between the largest and smallest district, expressed in percentages, is .399%.

The Pennsylvania legislature considered at least sixteen apportionment plans, and debated and voted on eleven different proposals to reapportion the congressional districts. Three of the plans voted on in either the House or the Senate had lower percentage variations that Act 42. The deviations ranged from .0895% to .1208%. One of them was sponsored by the Republican leadership and two by the Democrats. S.B. 805, P.N. 1579, had a deviation of .1208%. It was passed by the House of Representatives, but defeated in the Senate. In fact, all the other proposals were rejected by the legislature for various reasons, such as splitting the City of Pittsburgh into three separate congressional districts, and low percentages of black voters in Philadelphia and Pittsburgh districts. Three other plans with a lower deviation than Act 42 were also considered, but did not come to a vote.

The Republican party had bare majorities in both the House and Senate, but was unable to pass a reapportionment bill in the House without Democratic support. One of the major issues which impeded passage of legislation arose out of the need to pit incumbents against each other. For example, Philadelphia was an obvious locality for the elimination of a seat because of its loss in population. Even so, since the final configuration would affect the election prospects of two incumbents, substantial dis-

agreement was provoked by the necessity of putting them in the position of vying for a single seat. The desire to maintain a predominantly black district within the City, which would preserve the reelection chances of the incumbent black congressman, also led to difficulties in drawing district lines.

Other local considerations entered into the debates as well, such as attempting to avoid fragmentation of county and municipality boundaries, and retention of voters within the districts to which they had elected congressional incumbents. Finally, partisan considerations played a vital role in the proposed districting plans. Some were drawn to give a particular party a hoped for advantage in the forthcoming election, or to match two incumbents from the same party against each other. This latter consideration was particularly evident in western Pennsylvania, where much of the skirmishing concerned proposals that a Democrat oppose a Republican or that two Democrats oppose each other.

Interspersed throughout the debates were frequent references to the fact that, however the lines were drawn, the population between the districts had to be "basically in the same numbers. That is the established criteria on Federal congressional reapportionment and the most salient of the considerations."[2] The legislative journals

[2] Remarks of Senator Edward Zemprelli, Senate Minority Leader, 166 Commonwealth of Pennsylvania, Legislative Journal—Senate 1715 (daily ed. Jan. 26, 1982). This comment and others by legislative leaders demonstrate that numerical equality, as a constitutional concern, and a determination not to abdicate the redistricting responsibility to the federal courts, as a practical matter, were polestars.

also reveal that the debates focused on the undesirability of diluting the voting strength of minorities, particularly black citizens. The only black congressman in Pennsylvania was elected from a district in Philadelphia with a 74.7% black population.

Act 42 had a number of effects on minority voting strength. In Philadelphia, the boundaries of the Second district were redrawn so that its black population was increased to 80.0%. This district includes the residence of the incumbent black congressman. In the old First district, the black population was 44.7%, and in the old Third district, it was 32.4% black. The core of these two districts was merged into a new First district, with a black population of 32.17%

The old 14th district, which included parts of the City of Pittsburgh, had a black population percentage of 25.49%. As modified by Act 42, the 14th district comprised all of the City of Pittsburgh as well as some adjacent municipalities, but the black population was reduced to 21.77%. However, none of the reapportionment plans considered by the legislature provided for a 14th district with over 22% black citizens.

In the southeastern part of the state, the former Fifth district had a black population of 4.6%. Under Act 42, the percentage increased to 11.2%. The adjoining Seventh district had a black population of 10.6%, which was reduced to 5.9% by Act 42. The City of Chester, the only city in Pennsylvania that enjoys a black majority, was moved from the Seventh to the Fifth district under Act 42, accounting for the shift in minority population between these two districts.

Appendix A—Opinion of the United States District Court for the Middle District of Pennsylvania.

The plaintiffs in these consolidated suits may be divided into four groups. State Senator Kelley, representing Democratic legislators, is in the group that attacks the plan generally because of the failure to achieve numerical equality, the employment of partisan political concerns, and lack of good faith on the part of the defendants. Anna Miller and Alfred Ford[3] lead the group that challenge the redistricting as to Philadelphia and Chester, alleging that black voting strength has been diluted in both areas. Ted Simon, representing Westmoreland County municipal and county officials, contests the division of Westmoreland County into several congressional districts on partisan grounds and also adopts the Kelly arguments on numerical equality. The fourth group is headed by incumbent Congressman Doug Walgren and Jesse Del Gre who challenge the makeup of the 14th district on racial grounds as well as adopting the position of the Kelly plaintiffs.

I.

We will first discuss the numerical equality issues.

Beginning with *Baker v. Carr*, 396 U.S. 186 (1962), the Supreme Court shifted from its prior "hands-off" approach to the issue of reapportionment, and found that a

[3] Mrs. Anna Miller is a black citizen of Chester, in the Fifth congressional district, the former Seventh district. Mr. Alfred Ford is a black citizen of the First district in Philadelphia, who was permitted to intervene in the suit during the hearing on his agreement to be bound by all proceedings to date. Intervention was permitted over the objection of the defendants.

Richard Gerber, who was a congressional candidate, intervened as a plaintiff in this group. Because he has withdrawn his candidacy, the basis for his challenge has become moot.

state legislative apportionment challenge is justiciable under the Fourteenth Amendment. The Court gave substance to the constitutional standard in *Reynolds v. Sims*, 377 U.S. 533 (1964), when it enunciated a "one man, one vote" theory of representation for state legislatures. *Wesberry v. Sanders*, 376 U.S. 1 (1964), followed soon after and applied the same general approach to congressional reapportionment, relying for authority on Art. I, §2, of the United States Constitution.[4]

In *Wesberry*, the Court said that districts should be drawn so that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Id.* at 7-8 (footnote omitted). The Court surveyed the history behind Art. I, §2 of the Constitution, and concluded that "[w]hile it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives." *Id.* at 18.

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[4] Art. 1, §4 of the Constitution provides for congressional supervisory power over the regulation of elections. Congress first exercised this authority in 1842, and did so several times thereafter. In 1872, Congress required that districts contain "as nearly as practicable an equal number of inhabitants. . . ." Wesberry v. Sanders, 376 U.S. at 42-43 (Harlan, J., dissenting), *quoting* Act of Feb. 2, 1872, §2, 17 Stat. 28. This provision remained in subsequent apportionment statutes until 1929, when it was deleted by Congress. *Id.* Although later Congresses debated reenacting the provision, they did not do so. *Id.* at 43-44.

Similarly, in *Reynolds*, the Court held that "the Equal Protection Clause requires that a State . . . construct districts . . . as nearly of equal population as is practicable." 377 U.S. at 577. Again, the Court recognized "that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement." *Id.* (footnote omitted).

Five years later, in *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), the Court held that the *Wesberry* standard of "as nearly as practicable" required the state to "make a good-faith effort to achieve precise mathematical equality." *Id.* at 530-31. If, despite that effort, population variances resulted, the state "must justify each variance, no matter how small." *Id.* In that case, the deviation between the most and least populous districts was 5.97% or, in absolute numbers, 25,802 persons.

In *Preisler*, the state suggested that a fixed numerical variance, if small enough, should be considered *de minimis* so as to satisfy the "as nearly as practicable" standard, and that its 5.97% deviation fell within this range. The Court rejected this argument, stressing that it would be arbitrary to choose a particular cut-off point, and such a selection would "encourage legislators to strive for that range rather than for equality as nearly as practicable." Thus, only limited population variances are permitted, "which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." *Id.* The state then offered reasons to support the variances, including economic and social in-

terests, reasonable legislative compromises, partisan politics, avoidance of fragmentary local subdivisions, and geographic compactness. The Court found such justifications wanting and struck down the reapportionment.

That same day, the Court handed down its opinion in *Wells v. Rockefeller*, 394 U.S. 542 (1969), which invalidated New York's reapportionment plan. There, the state created seven subdivisions which were not equal in population but, within each region, the congressional districts contained approximately the same number of people. As a result, however, the districts in one subdivision were different in size from those in another. The Court stated that the general command of *Preisler* is "to equalize population in all the districts of the State and is not satisfied by equalized population only within defined sub-states." *Id.* at 546. Thus, that scheme was also held constitutionally deficient.

Numerical equality was the standard for both state legislative and congressional reapportionment until *Mahan v. Howell*, 410 U.S. 315 (1973). There, the Court announced that the "absolute equality" test of *Preisler* would not apply to state legislative districting, since it might "impair the normal functioning of state and local governments." *Id.* at 323. Rather, the objective for state legislative reapportionment "must be 'substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the States.' " *Id.* at 322, *quoting Reynolds v. Sims*, 377 U.S. 533, 579 (1964).

The dissent, on the other hand, argued that the same standard should apply for both types of reapportion-

ment, even though the differences between legislative and congressional districting might allow certain state interests to be recognized in legislative, but not congressional, apportionment. *Id.* at 340-41. As the dissent said, '[w]hile the State may have a broader range of interests to which it can point in attempting to justify a failure to achieve precise equality in the context of legislative apportionment, it by no means follows that the State is subject to a lighter burden of proof or that the controlling constitutional standard is in any sense distinguishable." *Id.*

A few months later, when the Court next considered congressional reapportionment in *White v. Weiser*, 412 U.S. 783 (1973), it was "not inclined to disturb" *Kirkpatrick v. Preisler. Id.* at 793. Yet, the Court did not "disparage" the state's interest in "maintaining existing relationships between incumbent congressmen and their constituents and preserving the seniority of [incumbents]." *Id.* at 791. Thus, the promotion of "consituency-representative relations" is one justification the Court acknowledges as support for population deviations.

In *Weiser*, the Court agreed with the district court that the reapportionment statute's percentage deviation of 4.13% was not "as mathematically equal as reasonably possible." 412 U.S. at 790. However, when faced with choosing between two alternative plans as a substitute, the Court adopted the plan that followed the general outline of the rejected state statute. In this respect, the Court observed that it was proper to "honor state policies in the context of congressional reapportion-

ment," and that, when choosing among plans, "a district court should not preempt the legislative task nor "intrude upon state policy any more than necessary.' " *Id.* at 795, *quoting Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971).

With these considerations in mind, the Court chose the plan with a .149% deviation, finding the variance tolerable because it "most clearly approximated the reapportionment plan of the state legislature, while satisfying constitutional requirements." *Id.* at 796. Thus, although the Court reiterated its support of *Preisler*, a less than absolutely equal plan was acceptable—the variance was in effect *de minimis*.

Announced the same day was *Gaffney v. Cummings*, 412 U.S. 735 (1973), a legislative reapportionment case. The Court again noted the dichotomy with congressional redistricting, and said minor deviations were only permissible in legislative cases.

Gaffney's reasoning, however, cannot easily be divorced from congressional reapportionment as well. For example, after recognizing that "minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case . . . so as to require justification by the State," the Court said that this would be so, "if for no other reason than that the basic statistical materials which legislatures and courts usually have to work with are the results of the United States census taken at 10-year intervals. . . ." *Id.* at 745. The Court went on to add that these figures "are inherently less than absolutely accurate. Those who know

about such things recognize this fact, and unless they are to be wholly ignored, it makes little sense to conclude from relatively minor 'census population' variations among legislative districts that any person's vote is being substantially diluted." *Id.* at 745-46.

The record in the case at bar does not establish the precise error in the census figures, but it is generally conceded to be at least one percent. Although the Supreme Court has not accepted statistical census error as a reason for excusing mathematical equality in congressional redistricting, it is a fact that cannot be ignored. It would be inconsistent, to say the least, for a court to overlook this premise when faced with congressional reapportionment, but to be allowed to consider it with legislative districting.

Another statement by the *Gaffney* court that is equally applicable to congressional districting is that the "census is more of an event than a process. It measures population at only a single instant in time. District populations are constantly changing. . . ." 412 U.S. at 746. Referring to the basic premise of one man, one vote, the Court continued, "if it is the weight of a person's vote that matters, total population . . . may not actually reflect that body of voters whose votes must be counted and weighed for the purposes of reapportionment, because 'census persons' are not voters." *Id.* (footnote omitted). It would defy logic if this court were to say that these factors did not hold true when dealing with congressional apportionment as well.

Although *Kirkpatrick v. Preiser* stands for arithmetical absolutism in congressional reapportionment, indiscriminate reliance on its rigidity is a dubious exercise. It was this point that formed the basis for Judge Gibbons' dissent in *Daggett v. Kimmelman*, 535 F. Supp. 978 (D.N.J. 1982), *prob. juris. noted*, 50 U.S.L.W. 3998.01 (June 22, 1982) (No. 81-2057). In that New Jersey congressional reapportionment case, the state's plan produced a total deviation of .6984%, which the majority found to be neither equal "as nearly as practicable," nor justifiable for its slight deviation. Judge Gibbons reasoned, however, that insignificant "variances may be justified which do not achieve statistically significant dilutions of the relative representation of voters in larger districts when compared with that of voters in smaller districts." *Id.* at 984 (Gibbons, J., dissenting). As he read *Kirkpatrick v. Preisler*, it did not prohibit "toleration of *de minimis* population variances which have no statistically relevant effect on relative representation. A plus-minus deviation of 0.6984% falls within the latter category." *Id.*

Justice Brennan, the author of the *Preisler* opinion, granted a stay from the *Daggett* court's order disapproving the reapportionment plan. In his opinion on the application for a stay, although carefully avoiding any expression on the merits, Justice Brennan found a reasonable probability that jurisdiction of the appeal would be noted and that "there is a fair prospect of reversal." As he saw the issue, *Daggett* "present[s] the important question whether *Kirkpatrick v. Preisler* requires adoption of the plan that achieves the most

precise mathematical exactitude, or whether *Kirkpatrick* left some latitude for the . . . legislature to recognize the considerations taken into account by it as a basis for choosing among several plans, each with arguably 'statistically insignificant' variances from the constitutional ideal of absolue precision." The Supreme Court did note jurisdiction, and we may expect that it will consider the application of *Preisler* to minimal variations.

This same issue is posed here. The deviation under Act 42, .2354% under the March census figures, is smaller than that in *Daggett*. The Mandarino plan, R.B. 2142, had the lowest variation of any plan voted upon in either house, .0895%, and it is only .1459% less than Act 42. Thus, the assorted proposals the legislature had to select from differed in only an extremely minor degree.

To hold that the legislature must adopt the plan with the least variation would effectively pre-empt its legislative perogative. The district court in *Drum v. Scott*, 337 F.Supp. 588, 590 (M.D. N.C. 1972), believed that *Preisler* and *Wells* "curtail but do not destroy, the 'de minimis' concept." The court chose not to read those cases to mean that "a state legislature must abdicate its responsibility to a cartographer with an adding machine." *Id.* at 591.

The Supreme Court has never disapproved a reapportionment plan with as minimal a total deviation as that provided by Act 42. In *Weiser*, the challenged variation was 4.13%. There the court observed that "at some point or level in size" variances do import "invidious devalua-

tion of the individual's vote and represent a failure to accord him fair and adequate representation." *Id.* at 793. The Court also commented on the large size of congressional districts and that each percentage point of deviation represented about 5,000 people. In *Weiser*, the difference in absolute numbers was approximately 20,000.

In the case at bar, however, under the figures supplied by the Census Bureau in March of 1981, the deviation in absolute numbers was 1,215, and even under the October revisions, it is only 2,060. These figures are also the extremes. The average deviations are 253 and 364, respectively. To further demonstrate how minimal the deviation actually is, only eight of the state's 23 districts exceed the average deviation using the March statistics, and nine districts do so under the revised October figures.

As Justice Brennan pointed out in his dissent in *White v. Regester*, 412 U.S. 755, 780-81 (1973), demand for mathematical equality "rests neither on a scholastic obsession with abstract numbers nor a rigid insensitivity to the political realities of the reapportionment process." Equality has been required so that the "weight of a person's vote will not depend on the district in which he lives." *Id.*[5]

[5] Strictly speaking, the weight of a person's vote depends on the number of voters—not the population—in a given election. A further indication of the doubtful validity of arithmetical absolutism is seen by contrasting the size of an ideal congressional district (using the 1980 census) in Montana, 393,345, with that in Arkansas, 571,609. The deviation between these ideal districts, 178,264, expressed in percentages is 31.18%. Thus, the vote of a citizen in Arkansas has substantially less weight than one in Montana. The deviation is unavoidable and occurs because congressional seats are required to be divided among the states. Obviously, that cannot be done with arithmetical precision.

After having carefully studied the relevant Supreme Court opinions, we are persuaded that the deviation here, using either the .2354% or .399% figure, falls within the category of a statiscally insignificant variation that can have only a miniscule, immeasurable effect on relative representation. As such, we conclude that Act 42 complies with *Preisler's* requirement of mathematical equality insofar as that standard is realistically attainable.

We do not disparage the constitutional interest in striving for population equality in congressional districting. The Court's decisions in *Kirkpatrick v. Preisler* and *White v. Weiser* have had a dramatic effect in Pennsylvania. As we noted earlier, the admonitions in those cases were clearly in the forefront of the legislature's considerations. Some appreciation of the effect of the Supreme Court's mandate may be derived from the results of the last three reapportionments. Under 1960 census figures, the deviation in reapportionment was 29.8954%. This was later reduced to 1.8%, using the 1972 census, and is now down to the present figure of less than one-half of one percent.

We cannot overlook the fact that the census is a snapshot of the population, a body which is constantly shifting and changing its size. As one commentator put it, "census figures themselves are not accurate enough nor, except momentarily, recent enough to justify minute equalization." R. Dixon, "The Court, The People, and 'One Man, One Vote,'" in REAPPORTIONMENT IN THE 1970's, 17 (N. Pulsby ed. 1971).

Absolute mathematical equality cannot in fact be achieved because, on the date that Act 42 was enacted,

the underlying census figures were not accurate. Births, deaths, migration, and census errors all contributed and undoubtedly will continue to do so during the next ten years.

The inability to achieve precise mathematical equality, however, should not dissuade us from striving toward its goal—equality in representation, insofar as that is practical. We do not abandon that quest, but remain faithful to the purposes and spirit of *Preisler* and *Weiser* by holding that the deviation in this case, under either set of figures, is so minor that a prima facie case requiring justification has not been made out. Further, a fair consideration of the record demonstrates that in adopting Act 42, the Pennsylvania legislature attempted in good faith to achieve substantial equality of population among the various districts, and at the same time attract sufficient support for passage.

II.

As we noted in our earlier opinion, somewhat different considerations come into play when claims of racial discrimination are appraised. Plaintiffs Miller and Ford contend that Act 42 reduced the voting strength of black citizens in the First, Second, Fifth, Seventh and Fourteenth districts and discriminated against them in violation of the Fourteenth and Fifteenth Amendments.

State legislative districts may be equal or substantially equal in population and still be vulnerable under the Fourteenth Amendment. *Gaffney v. Cummings*, 412 U.S. at 751. In *White v. Regester*, 412 U.S. at 765, the Supreme Court stated that multi-member legislative

districts could not be organized so as to invidiously cancel out or minimize the voting strength of racial groups. *See also Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Whitcomb v. Chavis*, 403 U.S. 124 (1971). We think the same criteria should be applied to the redistricting accomplished by Act 42.

To succeed in their claims, the plaintiffs must prove intentional discrimination. *City of Mobile v. Bolden*, 446 U.S. 55 (1980); *Rogers v. Lodge*, _____ U.S. _____, 50 U.S.L.W. 5041 (U.S. 1982). If the claim is asserted under the Equal Protection Clause of the Fourteenth Amendment, the burden is the same. We find, however, that plaintiffs have failed to meet their obligation of proving invidious discrimination.

We first consider the redistricting in the City of Philadelphia. As we have noted, the decrease in population in that city made it an obvious site for eliminating one congressional seat. The record establishes that the plaintiffs did not prove that this decision was based on anything other than neutral criteria nor did they show that it was discriminatory. We observed earlier that Act 42 increased the majority representation of black citizens in the Second district from 74.7% under the 1970 census, to 80% under the 1980 figures. The old First district, with a 44.7% black population, was combined with the old Third district of 32.4% black population to form a new First district with a total black population of 32.1%.

It is generally accepted that to make a "safe seat" a discrete group should have a majority of approximately 65%. *In re: Illinois Congressional Districts Reapportion-*

ment Cases, No. 81-C-3915, Slip. op. at 19 (N.D. Ill. 1982). In the City of Philadelphia, only one safe district, the Second, could practicably be created for the black population to have the required majority. To have reduced the percentage in the Second to benefit the First may have jeopardized the Second district seat and might well have been evidence of intent to discriminate. The redistricting in Philadelphia, therefore, must be seen as a preservation of the status quo of the black voters and not retrogression.

The Fifth and Seventh districts are located in the southeastern part of Pennsylvania. The Fifth is substantially larger geographically, and borders the Seventh on its western boundary line. The situation in those districts differs from Philadelphia in that neither had a black majority or "safe seat" before the redistricting, and Act 42 does not change this.

Under Act 42, the lower Delaware industrial corridor was moved from the Seventh to the Fifth congressional district. A portion of the City of Philadelphia was then added to the Seventh. The City of Chester, which has a 57% black population, was moved from the Seventh to the new Fifth district. The net result was that the new Fifth district increased its ratio of black population from 4.6% to 11.2%. In the new Seventh district—in the Delaware River industrial corridor—there was a reduction from 10.6% to 5.9% black population. Because the shifts in percentages of black population between the two districts cancelled each other out, from a numerical standpoint there is no substance to the plaintiffs' dilution claim.

The plaintiffs argue, however, that they had a stronger community interest with white liberals and politically active black citizens in the districts as they were formerly bounded, particularly in the Seventh district. Much of the evidentiary material submitted by the plaintiffs established their satisfaction with their former congressman and their reservations about the incumbent in the district established under Act 42. These considerations, however, do not show a purposeful dilution of black voting strength.

The statistics show that there could not be a majority black district formed in the area. We are not convinced by the evidence that the voting power of black citizens in either the Fifth or Seventh district has been unconstitutionally minimized because of the redistricting. The plaintiffs' preference for one incumbent over another is not an adequate basis for finding intentional racial voting dilution as warrants intervention by the court. As the Court in *Bolden* said, "[i]n the absence of . . . an invidious purpose, a State is constitutionally free to redraw political boundaries in any manner it chooses." 446 U.S. at 63.

The situation in the 14th district is even less compelling. That district was formed from three others and now incorporates all of the City of Pittsburgh, the adjoining City of Wilkinsburg, and certain municipalities to the west. Plaintiffs argue that if the district lines had been drawn to incorporate municipalities to the southeast, instead of the west, there would have been a higher percentage of black citizens in the 14th district. There has been no showing, however, that the increase would have produced a black majority district or that the legislature acted with intent to discriminate.

The City of Pittsburgh had a 24% black population under the 1980 census figures, and a total population of 423,938. It is thus the predominant municipality in the 14th district. The old 14th had a black population ratio of 25.49% while the figure for the new one is 21.77%. This statistical change does not demonstrate purposeful discrimination, nor does the failure of the legislature to include within the 14th district the municipalities preferred by the plaintiff. In any event, it would not be possible to create a district in the Pittsburgh area with a black majority.

We conclude, therefore, that in each of these three instances, plaintiffs Miller, Ford and Del Gre have not demonstrated purposeful intent to discriminate, nor dilution of minority voting strength.

III.

Plaintiff Simon and those joining with him have an additional claim of their own. Simon complains that Westmoreland County, which is located in the western part of the state, has historically been included in one congressional district and has been its hub. Act 42, however, divides the county among three separate districts. As a result, plaintiffs assert that they and the citizens of Westmoreland County do not have the advantages of a single congressman who would be sensitive to their needs.

In a sense, the complaints of the Simon plaintiffs have some similarities to those of Miller—the disruption of previously established, and favorably regarded, representation patterns. It is obvious that the situation in which

Westmoreland County finds itself is the result of the legislature's decision to tailor the congressional districts to provide some assistance to a Republican incumbent in his contest with his Democratic opponent. In addition, most of Westmoreland County was included in a district which resulted in two Democratic incumbents opposing each other. In sum, Westmoreland County was the victim of gerrymandering.

As we stated earlier, simply splitting the county into different districts does not amount to a constitutional violation, nor has the Supreme Court condemned gerrymandering as such. Although the court might have designed districts that were more compact and contiguous, that would not necessarily have guaranteed that all of Westmoreland County would be in one district.

In any event, the test is not whether a better plan could have been designed, but whether Act 42 passes constitutional muster. We may not disapprove a plan simply because partisan politics had a role in its creation. That politics played a part is demonstrated by the constituency-representation result, viz., 87.7% Republican, 68.2% Democratic. However, it seems fair to conclude that a Republican sponsored Bill would have to make some political accommodation to a Republican legislature in order to obtain sufficient votes for passage. The Supreme Court has often reminded the federal courts that "state legislatures have primary jurisdiction over legislative reapportionment." *White v. Weiser*, 412 U.S. at 795. "Districting inevitably has sharp political impact and inevitably political decisions must be made by those charged with the task." *Id.* at 796. "Politics

and political considerations are inseparable from districting and apportionment." *Gaffney v. Cummings*, 412 U.S. at 753.

Our role is not to insure that the Legislature has come up with the best plan—only that the one enacted passes minimal constitutional scrutiny. We understand the complaints of the Westmoreland County plaintiffs, but we are not empowered to remedy them under the guise of finding constitutional deficiencies when none exist. The remedy lies in the ballot box, not in a federal courthouse. We conclude that the contentions of the Westmoreland County plaintiffs must be rejected.

Having found that Act 42, despite its faults and deficiencies, meets the constitutional threshold, our task is completed. We therefore deny the plaintiffs' request for permanent injunction and enter judgment for the defendants.

An appropriate order will be entered.

Appendix A—Opinion of the United States District Court for the Middle District of Pennsylvania.

ORDER

AND NOW, to wit, this 13 of September, 1982,

IT IS ORDERED AND DECREED that:

The plaintiffs' request for a decree to enjoin, set aside and annal Act 42 as unconstitutional and enjoining defendant state officers from conducting primary or general congressional elections under its terms is denied; and

The complaint be and hereby is dismissed.

JOSEPH B. WEIS, JR.
United States Circuit Judge

WILLIAM J. NEALON, JR.
Chief United States District Judge

SYLVIA H. RAMBO
United States District Judge

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Appendix A—Opinion of the United States District Court for the Middle District of Pennsylvania.

APPENDIX "A"

1. This case raises issues under Article I, § 2 of the United States Constitution and Amendments 1 and 14 of the United States Constitution, and the court has jurisdiction over this matter under Title 28 U.S. Code §§ 1343(3), 2201, 2202, and 2284, and Title 42 U.S. Code §§ 1982 and 1988.

2. In December 1975, Congress enacted P.L. 94-171, 13 U.S.C. § 141. This statute elaborates upon the Constitutional mandate that a population census be taken every ten years.

3. P.L. 94-171 states, in pertinent part:

> "The tabulation of total population by States . . . as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States."

13 U.S.C. § 141(b).

4. Federal law provides further that the President shall utilize these data to determine the number of representatives to which each state would be entitled, and to communicate this determination to the Clerk of the House of Representatives, who, in turn, informs the Governor of each state. 2 U.S.C. § 2a.

5. 13 U.S.C. § 141(c) provides further that the tabulation of population for Congressional reapportionment "shall be completed by [the Secretary of Commerce] as expeditiously as possible after the decennial census date and reported to the Governor of the State . . . and to the

officers or public bodies having responsibility for legislative apportionment and districting of such State." In addition, this statute requires that these figures be "completed, reported, and transmitted to each respective State within one year after the decennial census date."

6. In Pennsylvania, the General Assembly is the "public body having responsibility for Congressional districting." This body, by the action of the President *Pro Tem* of the Senate and the Speaker of the House, designated Richard E. Campbell, the Executive Director of the Legislative Data Processing Center, as the liaison with the U.S. Bureau of the Census and the official recipient of the reapportionment population figures.

7. The Legislative Data Processing Center was established in 1967 as a non-partisan agency of the State Legislature that provides data processing services to the majority and minority caucuses of both the State Senate and the State House of Representatives.

8. Pursuant to his delegated responsibility, Mr. Campbell traveled to the offices of the U.S. Bureau of the Census in March 25, 1981 to pick up the reapportionment population figures. These data were converted from a census tract basis to a political subdivision basis by agents of the Legislative Data Processing Center and were utilized as the data base for both state legislative apportionment and Congressional redistricting.

9. 1980 census figures indicate that Pennsylvania gained population to a lesser extent than other states and, accordingly, the Congressional Delegation of Pennsylvania was to be reduced from 25 to 23.

10. The information provided by the Census Bureau to the Legislative Data Processing Center indicated that the total population of Pennsylvania, under the 1980 census, was eleven million eight hundred sixty-six thousand seven hundred twenty-eight (11,866,728).

11. On October 22, 1981 the Director of the Bureau of the Census forwarded revised census figures to the Secretary of Commonwealth of Pennsylvania with carbon copies directed to eleven individuals, ten of whom work in some branch of the Pennsylvania State Government. An attachment to the letter indicated that the provisions would appear in the final 1980 Census Report. Copies of the letter were sent to Mr. Joseph H. Myers, Coordinator, Public Library State Aid, Bureau of Library Development; Mr. Harold L. Myers, Director, Bureau of Municipal Services, Pennsylvania Department of Transportation; Mr. Robert K. Bloom, Acting Secretary of Revenue; Mr. Harry Yaverbaum, Deputy Auditor General; Mr. J. Phil Doud, Director, Bureau of Municipal Audits; Dr. Harris Reynolds, Pennsylvania Department of Education; Ms. E. W. Rickenbach, Director of Liquor Licensing, Pennsylvania Liquor Control Board; Mr. Ronald Kresge, Pennsylvania Department of Commerce; Mr. Murray Dickman, Deputy Executive Assistant to the Governor; Mr. Richard E. Campbell, Executive Director, Pennsylvania Legislative Data Processing Center; and Ms. Nathalie Sato, EMS, Office of Budget and Administration, Governor's Office.

12. The information forwarded by the Census Bureau to the Legislative Data Processing Center indicated that

the total population of Pennsylvania, under the 1980 Census, was revised to eleven million eight hundred sixty-three thousand eight hundred ninety-five (11,863,895).

13. After the State Legislature had been reapportioned but before Congressional redistricting had occurred, Mr. Campbell was one of the state officials who received notice from the U.S. Bureau of the Census that the earlier population figures released for 17 municipalities had been revised. These revisions did not include the racial composition of the affected municipalities. The notice was silent as to whether or not these revisions should be incorporated into the data base utilized in reapportionment.

14. Mr. Campbell determined that these changes were not applicable to the data base used for reapportionment. He based this determination on the fact that the figures had not been received within one year of the census date, April 1, 1980. Furthermore, because the notice specifically stated that these revisions would be included in the final population reports for the states, Mr. Campbell concluded that the point of this notice was merely to provide advance notice to the States, rather than a direction to make changes retroactively.

15. Mr. Campbell made this determination without consulting any members of the General Assembly or staff members thereof. He did not inform any of these individuals of his receipt of this notice until Act 42 was enacted into law, and only then in response to an inquiry.

16. Under the Pennsylvania Constitution, the legislature was mandated to preserve compactness, county boundaries where possible and communities of interest in legislative redistricting.

17. The General Assembly and reapportionment drafters have knowledge of census data. Documents, facilities and equipment are made available by the Legislative Data Processing Center.

18. The General Assembly and drafters of reapportionment plans have knowledge of pronouncements of federal courts which present detailed standards by which actions are judged and what factors may legitimately motivate redistricting decisions.

19. Between August 1981 and March 4, 1982 approximately 140 Congressional Redistricting Plans were run by the Legislative Data Processing Center under the direction of Richard Campbell.

20. The Pennsylvania General Assembly voted on approximately eleven (11) Congressional Redistricting Plans prior to the enactment of Act 42. This figure does not include all amendments to each bill voted on or plans that were re-introduced.

21. Act 42 was passed by the Pennsylvania General Assembly and signed into law by the Governor of Pennsylvania on March 4, 1982.

22. Under the census data supplied in March of 1981, the ideal district population in Pennsylvania was Five Hundred Fifteen Thousand Nine Hundred Forty-four (515,944). Under such census data, the deviation from the ideal district under Act 42 is as follows:

Appendix A—Opinion of the United States District Court for the Middle District of Pennsylvania.

DISTRICT	*DEVIATION*
9	- 514
10	- 502
5	- 416
4	- 372
13	- 237
1	- 237
11	- 215
7	- 178
16	- 112
2	- 46
17	- 44
12	- 29
6	8
23	32
22	35
20	84
18	124
19	157
3	210
8	352
15	548
14	667
21	701

1.	**Total Deviation**	**- 5,820**
2.	**Average Deviation**	**- 253**
3.	**Range of Deviation between largest and smallest**	**- .2354**
4.	**Average Percent Deviation**	**- .0490**

23. Under the census data supplied in October of 1981, the ideal district population in Pennsylvania was Five Hundred Fifteen Thousand Eight Hundred Twenty-Two (515,822). Under such census data, the deviation from the ideal district under Act 42 is as follows:

DISTRICT	*DEVIATION*
16	- 1236
22	- 699
15	- 562
9	- 391
10	- 379
5	- 293
4	- 249
13	- 114
1	- 114
11	- 92
7	- 55
2	77
17	79
12	94
6	131
23	155
20	207
18	229
3	333
8	475
19	784
14	808
21	824

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1.	Total Deviation	-- 8,380
2.	Average Deviation	- 364
3.	Range of Deviation between largest and smallest	-- .399
4.	Average Percent Deviation	-- .0700

24. Of the sixteen (16) Congressional Redistricting Plans considered by the Pennsylvania General Assembly, six (6) had population deviations of a percentage less than the population deviations of Act 42. This would be true regardless of which set of numbers, March or October 1981, were used.

25. The following plans, considered by the legislature, had deviation ranges less than Act 42.

PLAN	*RANGE*
Zemprelli I (S.B. 1229)	.1699%
H.B. 2110, P.N. 2658	.1206%
Manderino (H.B. 2142)	.0895%
S.B. 805, P.N. 1579	.1208%
Zemprelli II	.1179%
Zemprelli III	.0321%

26. The plan with the lowest total deviation (.0321%), Zemprelli III, was never voted on by the legislature. Zemprelli I and H.B. 2110 also did not come to a vote.

27. The Manderino Plan, (H.B. 2142), was offered in the House of Representatives for a vote by Representative James Manderino as an amendment to S.B. 805, P.N. 1552.

28. The Manderino Plan was the first state-wide redistricting plan put to a full vote of either House.

29. The Manderino Plan was defeated by the House of Representatives on January 19, 1982, by a vote of 71 to 126.

30. The Manderino Plan was not offered again to be voted upon by either the House of Representatives or the Senate.

31. The Manderino Plan contained the lowest deviation of all state-wide redistricting plans voted upon by either House (.0895%), but there were other features of the plan including:

(a) Percentage of blacks in proposed First district (the combined Smith/Foglietta District): 25.6%;

(b) Percentage of blacks in proposed Second district (the Gray District): 67.0%;

(c) Percentage of blacks in proposed 14th district (the Pittsburgh District): 19.6%;

(d) City of Pittsburgh was placed in 3 separate districts;

(e) A contiguity problem in proposed 13th District regarding Lower Frederick Township and Upper Frederick Township, Montgomery county;

(f) Percentage of retention of existing districts; 77.3%.

32. S.B. 805, P.N. 1579, was adopted by the House of Representatives on January 20, 1982, by a vote of 104 to 88.

33. S.B. 805, P.N. 1579, was adopted after the House rejected the Manderino Plan.

34. S.B. 805, P.N. 1579, was the first state-wide redistricting plan to be approved by either House.

35. S.B. 805, P.N. 1579, was sponsored and supported by the House Republican leadership and was opposed by the House Democratic leadership.

36. After S.B. 805, P.N. 1579, was approved by the House, it went to the Senate for approval.

37. Prior to voting on S.B. 805, P.N. 1579, the Senate brought up the Zemprelli II Plan for a vote.

38. The Zemprelli II Plan has an overall deviation of .1179%

39. The Zemprelli II Plan was offered by Senator Edward Zemprelli as an amendment to H.B. 376, P.N. 1610.

40. The Zemprelli II Plan was defeated by the Senate on January 26, 1982, by a vote of 21 to 26.

41. The Zemprelli II Plan was not offered again to be voted upon by either the House of Representatives or the Senate.

42. The Zemprelli II Plan contained the second lowest deviation (.1179%) of all state-wide redistricting plans voted upon by either House, but there were other features of the plan including:

(a) Percentage of blacks in proposed First district (the combined Smith/Foglietta District): 30.2%;

(b) Percentage of blacks in proposed 14th district (the Pittsburgh District): 16.1%;

(c) Percentage of retention of existing district: 68.9%;

(d) A contiguity problem in (1) proposed 23rd district, regarding Lawrence Park Township and Wesleyville Borough, Erie County; (2) proposed Seventh district, regarding Thornbury Township, Chester County; and (3) proposed Fifth district, regarding Narberth Borough, Montgomery County.

43. Following the defeat of the Zemprelli II Plan, the Senate voted on S.B. 805, P.N. 1579.

44. S.B. 805, P.N. 1579, was sponsored and supported by the Senate Republican leadership and was opposed by the Senate Democratic leadership.

45. S.B. 805, P.N. 1579, was defeated by the Senate on January 26, 1982, by a vote of 13 to 35.

46. Following the defeat of S.B. 805, P.N. 1579, the Senate debated and voted upon seven additional redistricting plans, specifically:

(a) February 3, 1982: S.B. 805, P.N. 1653, defeated 18 to 31;

(b) February 4, 1982: O'Connell V, defeated 18 to 30;

(c) February 10, 1982: Jubelirer/Zemprelli, defeated 11 to 37;

(d) February 11, 1982; Corman I, defeated 21 to 26;

(e) February 22 and 23, 1982: Hayes/Dagger, defeated 18 to 30;

(f) February 23, 1982: Corman II, defeated 19 to 26;

(g) March 1, 1982: Act 42, adopted 28 to 22.

47. Act 42 was adopted by the House of Representatives on March 2, 1982, by a vote of 118 to 73.

48. Act 42 is the only state-wide redistricting plan voted upon by either House which was approved by both houses.

49. The numerical variations among the Congressional Districts under Act 42 are much narrower than those contained in the previous reapportionment plan. Although the ideal size under the 1971 plan was 472,031, the smallest district was 4,220 people less than the ideal and the largest 4,279 above ideal. The total percentage deviation in that plan was 1.8%.

50. Act 42 divided seventeen (17) counties into two (2) or more Congressional Districts and six (6) counties into three (3) or more Congressional Districts.

51. Act 42 divided five (5) municipalities (Philadelphia, Seven Springs Borough, Telford Borough, Tunnel Hill Borough and Upper Moreland Township) into two (2) or more Congressional Districts. Ashland Borough became merged with another municipality.

52. Act 42 of 1982 created an "open district" in the 21st Congressional district. An open district is one in which no present incumbent resides.

53. In January of 1982, Congressman Marc Lincoln Marks announced that he would not seek reelection.

54. The population in the City of Philadelphia declined to 1,688,210, a decrease of 13.4%. This, coupled with the enlargement of the ideal size of a Pennsylvania Congressional District, necessitated that the City of Philadelphia would "lose a seat." In other words, the population could support only a maximum of three districts which were totally within the confines of the City, with 140,000 people left over who would have to be assigned to one or more districts outside the city. This also meant that one of the new Philadelphia Congressional districts would include the official residence of two present incumbents.

55. Under the 1972 redistricting, there were four wholly contained congressional districts within the City of Philadelphia, the First, Second, Third and Fourth districts. The 21st Ward in Northeast Philadelphia was contained in the 13th district.

56. Act 42 did eliminate one district in Philadelphia. This was accomplished by combining the old First and Third districts into the new First district. This new congressional district includes the residences of two present incumbents—Congressmen Smith and Foglietta.

57. After the 1980 census but prior to Act 42, the Second district was 74.7% black and was represented by a black man. Act 42 increased the percentage of black persons in that district to 80%.

58. After the 1980 census but prior to Act 42 the First district was 44.7% black and the Third district was 32.4% black.

59. Under Act 42, the First district was comprised of 54.0% of the former Third district and 40.4% of the former First District.

60. No reapportionment plan for the Philadelphia area, voted on by the legislature, had a black population for the First district of over 37.8%.

61. Under Act 42, the black population percentage in the First district (32.17%) was higher than or equal to the black population percentage for the proposed First district contained in Democratic plans: Zemprelli I, 20%; Manderino, 25.6%; Zemprelli II, 30.2%; Zemprelli III, 32.1%.

62. Since at least 1958, the Second district has been represented by a black man.

63. From May 1958 to January 1979, Robert N.C. Nix represented the Second district in Congress. Representative Nix is a black man.

64. From January 1979 to the present, William H. Gray, III, has represented the Second district in Congress. Representative Gray is a black man.

65. During the time that the 1972 map was in effect, the individuals who represented the First, Third and Fourth districts in Congress were white men.

66. During the time that the 1972 map was in effect, the only member of Pennsylvania's Congressional delega-

tion who was black was the representative of the Second district.

67. Act 42 assigns the 140,000 Philadelphia residents, who were not included in any of the three districts totally within the City of Philadelphia, to the Seventh, Eighth and 13th districts.

68. Under the 1980 census, the City of Pittsburgh has a total population of 423,938 and a black population of 101,813 for a black percentage of 24% (March, 1981, census figures).

69. Under the 1972 redistricting plan, Pittsburgh was divided among three Congressional districts: the 14th district, the 18th district, and the 20th district.

70. Prior to redistricting under Act 42, the 14th district had the lowest population of any other congressional district in the state.

71. The population in the 14th district, prior to redistricting under Act 42, declined from 470,603 in 1970 to 387,764 in 1980.

72. Prior to redistricting under Act 42, the predominantly Allegheny County Congressional districts had the following percentage of black population: (1) the 14th district, 25.49%; (2) the 18th district, 2.5%; and (3) the 20th district, 7.4%.

73. The geographical "core" of the old 14th district consisted of the municipalities of Pittsburgh, Wilkinsburg and Mount Oliver. The March 1981 census figures indicated that these three municipalities had a

total population of 452,183 people, or about 60,000 short of ideal size. Of this total, 110,624 or 24.46% were black people.

74. The new 14th district has 516,611 people, 667 above ideal size. This district is 21.8% black.

75. It is not mathematically possible to create a congressional district in the Pittsburgh area with a black majority.

76. Under Act 42, City of Pittsburgh is located within one congressional district, the 14th district.

77. Under the 1980 census, Wilkinsburg Borough, an eastern suburb of Pittsburgh, has a total population of 23,669 and a black population of 8,794 for a black percentage of 37.2%.

78. Under the 1972 redistricting plan, Wilkinsburg Borough was located within the 14th district.

79. Under Act 42, Wilkinsburg Borough is located within the 14th district.

80. Under the 1980 census, Coraopolis Borough, a western suburb of Pittsburgh, has a total population of 7,308 and a black population of 888.

81. Under the 1972 redistricting plan, Coraopolis Borough was located within the 22nd district.

82. Under Act 42, Coraopolis Borough is located within the 14th district.

83. Under the 1980 census, McKees Rocks Borough, a western suburb of Pittsburgh, has a total population of 8,742 and a black population of 790.

84. Under the 1972 redistricting plan, McKees Rocks Borough was located within the 18th district.

85. Under Act 42, McKees Rocks Borough is located within the 14th district.

86. Under the 1972 redistricting plan, the 20th district contained the following municipalities, all of which are southeastern suburbs of Pittsburgh:

	Total Pop.	*Black Pop.*	*Black Percentage*
McKeesport City	31,012	4,212	13.6%
Clairton City	12,188	3,076	25.2%
Braddock Borough	5,634	2,670	47.4%
Duquesne City	10,094	2,352	23.3%
Homestead Borough	5,092	1,877	36.9%
Monroeville Borough	30,977	1,790	5.8%
West Mifilin Borough	26,279	1,628	6.2%
Rankin Borough	2,892	1,294	44.7%
North Braddock Township	8,711	1,275	14.6%
North Versailles Township	13,294	1,098	8.3%
Swissvale Borough	11,345	664	5.9%

87. All of the municipalities listed in the previous statement were retained within the 20th district under Act 42.

88. Under Act 42, the 14th district consists of the City of Pittsburgh and 13 suburban municipalities.

89. From the 13 suburban municipalities, 92,673 people were added to the City of Pittsburgh population of 423,938 to achieve a total population for the 14th District of 516,611.

90. Of the 92,673 people from the 13 suburban municipalities, 10,701 are black.

91. Directly East of the City of Pittsburgh are communities which have higher concentrations of black persons.

92. Under the 1972 redistricting plan and the 1970 census figures, the 14th district had a black percentage of 21%.

93. Under the 1980 census figures and prior to redistricting under Act 42, the 14th district had a black population of 98,970, a black percentage of 25.49%.

94. Act 42 increases the black population of the 14th District from 98,970 to 112,514, an increase of 13,544.

95. Under Act 42, the predominantly Allegheny County Congressional districts have the following percentage of black population: (1) the 14th district, 21.77%; (2) the 18th district, 2.3%; and (3) the 20th district, 5.5%.

96. Under Act 42, the black population percentage in the 14th district (21.77%) was higher than or equal to the black population percentage for the proposed 14th district contained in Democratic plans: Zemprelli II, 16.1%; Zemprelli III, 18%; Zemprelli I, 19%; and Manderino, 19.6%.

97. No reapportionment plan considered by the legislature had a black population in the 14th district of over 22%.

98. The City of Chester is the only black majority city in the Commonwealth.

99. According to the 1980 Census, the City of Chester had a total population of 45,794 people. Of this total, 26,009 people or 57% are black.

100. In the recent past, the City of Chester's assignment of congressional districts has switched back and forth between the District which includes Chester County and that which includes Delaware County. Prior to 1966, it was part of the Delaware County district. From 1966 to 1972, it was part of the Chester County district. From 1972, Chester was part of the Delaware County district. Under Act 42, it was assigned to the Chester County district.

101. From 1966 to 1972, Chester was placed in the Ninth district. This district encompassed the geographical western half of Delaware County and all of Chester County, including Media.

102. In 1982, Act 42 places Chester in the Fifth district which includes the western line of Delaware County and the eastern half of Chester County and the northern part of Montgomery County.

103. Act 42 separates the City of Chester from the Riverfront Corridor and from Media, the county seat, for congressional elections.

104. From 1966 until Act 42 the City of Chester has been in the same congressional district as Media, the county seat, in the Seventh district.

105. As a result of the 1980 census, Delaware County needed approximately 94,600 people to form one congressional district.

106. The black population of the Seventh district under the 1972 figures was 44,665.

107. Under Act 42, the black population of the Seventh district is 30,430, a difference of 14,235 in absolute numbers or a decrease in percentage terms of 31.9%.

108. Under the 1972 configuration, the minority population was 10.6%.

109. Under Act 42, the Seventh district has a black population percentage of 5.9% as compared with a black population percentage of 10.6% within the district prior to redistricting.

110. Under Act 42, the Fifth district has a black population percentage of 11.2% as compared with a black population percentage of 4.6% within the district prior to redistricting.

111. Under the 1980 census and Act 42, the Fifth district, without Chester City, has a black population of 31,730 and, with Chester City, has a black population of 57,739.

112. The 40th Ward located in the southwestern extremity of the City of Philadelphia was moved into the Seventh district with the exception of one division, the second division which went into the Second district; this division had 1,061 black residents and 52 white residents while the ward, itself, is overwhelmingly white.

113. Robert Wright, a black state representative from Chester City, voted in favor of Act 42.

114. In the Erie-Northwest area, under the 1972 act, the old 24th district included all of Erie County, all of Crawford County and all of Mercer County.

115. Act 42 places all of Erie County, all of Mercer County, and all of Crawford County in the 21st district and picks up the remaining necessary population for Lawrence County.

116. Erie County has never been split between two or more congressional districts.

117. Act 42 divides Westmoreland County into segments so that Westmoreland County is now part of three (3) separate districts.

118. From the Federal census of 1970 to the Federal census of 1980, Westmoreland County's population increased by 4.1%.

119. Westmoreland County is the 6th most populous county in Pennsylvania.

120. According to the March 1981 census data, the population of Westmoreland County was 392,294.

121. The population of Westmoreland County would constitute approximately 76% of an ideal congressional district under the March, 1981 census figures for reapportionment.

122. Under Act 42, Westmoreland County residents constitute 31.1% of the 20th district.

123. Under Act 42, Westmoreland County residents constitute 49.3% of the 12th district.

124. Under Act 42, Westmoreland County residents constitute 2.4% of the Fourth district.

125. Westmoreland County constituted over 80% of the population of the 21st district formed after the 1972 reapportionment.

126. Under Act 42, the retention of existing districts is 79.2%. Expressed another way, 79.2% of Pennsylvania's population continue to reside within their former congressional district.

127. A reduction of 1% in the constituency retention percentage means that a total of 118,667 people statewide would no longer remain in the same congressional district after redistricting.

128. Averaged among Pennsylvania's 23 congressional districts, a reduction of 1% in the constituency retention percentage means that an average of 5,159 people would no longer remain in the same congressional district after redistricting.

129. The percentage of the constituency-representative relationships, retained on a party basis, of the Democratic incumbents are:

New District	*Name of Incumbent*	*Old District*	*% of Retention*
1	Smith	3	54.0
2	Gray	2	73.6
6	Yatron	6	91.7
7	Edgar	7	70.0
12	Murtha	12	50.6
14	Coyne	14	66.8
17	Ertel	17	86.1
18	Walgren	18	51.2
20	Gaydos	20	55.0
22	Murphy	22	81.4

(A) Total percentage of retention for Democratic Incumbents: 68.2%

(B) Percentage of retention excluding those new districts which have incumbents running against each other (i.e., First and 12th, 71.9%).

130. The loss of two congressional districts, reducing the Pennsylvania delegation from 25 to 23, without migration of any population, would permit only a 91.3% retention of constituent-representative relationships.

131. The 79.2% constituency retention percentage in Act 42 is higher than or equal to the constituency retention percentage in any plan that was voted upon by the General Assembly with the exception of O'Connell II.

132. O'Connell II plan had a constituency retention percentage of 79.9%. It also had an overall deviation of .7593%.

133. The Congressional delegation plan had a constituency retention percentage of 81.1% and had an overall deviation of .8481%.

134. The Congressional delegation plan was not voted upon by either House.

135. The northeast Philadelphia district, the old Fourth, was represented in Congress in 1972 by a Democrat, in 1974 by a Democrat, in 1976 by a Democrat, in 1978 by a Republican and in 1980 by a Republican.

136. The 1980 fall registration figures for the northeast Philadelphia district indicate that Democrats had

more than a 102,000 registration majority within the district under the 1972 reapportionment plan.

137. The Manderino Plan would have increased the Democratic 1980 fall registration margin in the proposed Third district to over 134,000.

138. Bucks County has a total population of 479,211 (March, 1981 census).

139. Prior to 1972 and Act 42, Bucks County was in a single congressional district and obtained the necessary additional population from Montgomery County, a neighboring suburban county.

140. If Bucks County were placed within a single congressional district, it would comprise 93% of the ideal district size, requiring approximately 36,733 additional population to be added from outside the county.

141. Act 42 places all Bucks County in a single district, the Eighth, and adds 37,085 from neighboring suburban Montgomery County.

142. The Manderino Plan proposed to split Bucks County and to add 51,418 residents from the City of Philadelphia.

143. Portions of Philadelphia have never been placed in the same congressional district with Bucks County.

144. The Eighth congressional district was represented in Congress in 1972 by a Republican, in 1974 by a Republican, in 1976 by a Democrat, in 1978 by a Democrat, and in 1980 by a Republican.

145. The 1980 fall registration figures for the Eighth district under the 1972 configuration indicated that Republicans had a 20,876 registration majority.

146. Under Act 42, the Republican majority is 16,831.

147. The Manderino Plan would have reduced the Republican registration to 1,045.

148. Under Act 42, the Erie-Northwest district contains 96.1% of the constituency that it had under the 1972 plan.

149. Under the proposed Manderino Plan, this Erie-Northwest district would have retained less than 80% of the constituency that it had under the 1972 plan.

150. The Manderino Plan proposed to divide Erie County and to divide Crawford County.

151. The party represented in the Erie-Northwest district in Congress in 1972 was a Democrat, in 1974 a Democrat, in 1976 a Republican, in 1978 a Republican and in 1980 a Republican.

152. The incumbent Republican congressman in the old 24th district won reelection in 1980 by a total of 120 votes out of 174,555 votes cast.

153. The 1980 fall registration figures for the Erie-Northwest district under the 1972 Act gave the Democrats a 25,888 registration majority.

154. The Manderino Plan proposed to increase the Democratic voter registration margin to 34,535.

155. Act 42 creates a congressional district in the western part of the state that includes the residences of two present incumbents—Congressman Murtha and Bailey.

156. Congressman Murtha is a member of the Appropriations Committee; and Congressman Bailey is a member of the Ways and Means Committee, which oversees such issues as unemployment compensation and social security, which are of interest to the Commonwealth of Pennsylvania because of this senior citizen population and because of its unemployment situation.

157. Every proposed plan considered by the legislature merged the First and Third districts, the Smith and Foglietta districts. Of the 11 different plans, other than Act 42, that were voted on by the legislature, three of the plans merged the Murtha-Bailey districts, as did Act 42.

158. The two Democratic leadership proposals would have merged the district of Congressman Atkinson with the district of Congressman Murphy.

159. The Manderino Plan would have left Congressman Murphy with 60.3% of his existing district and Congressman Atkinson with 39.6% of his existing district.

160. The party representing the Seventh congressional district in Delaware County in 1972 was a Republican, in 1974 a Democrat, in 1976 a Democrat, in 1978 a Democrat, and in 1980 a Democrat.

161. The 1980 fall registration for the Seventh district under the 1972 configuration indicated that Republicans had a 99,807 registration majority.

162. Under Act 42, the Republicans have a 97,451 majority.

163. The Mandarino Plan would have reduced the Republican 1980 fall registration in the proposed Seventh district to 61,260.

164. The City of Chester is contained within the boundaries of the 159th state legislative district.

165. The 159th legislative district was represented in Harrisburg in 1972 by a white Republican, in 1974 by a white Republican, in 1976 by a white Democrat, in 1978 by a black Republican, and in 1980 by a black Republican.

166. Representative Early, who was elected in 1980, died during his current term and the 1981 special election resulted in the election of representative Robert Wright, a black Republican, to fill the balance of representative Early's term.

167. Representative Wright was nominated on May 18, 1982, while the Democratic party nominated Charles McLaughlin, a white Democrat.

168. Act 42 creates 14 districts with a Democrat registration majority and 9 districts with a Republican registration majority.

169. Statewide, Pennsylvania has a 697,812, or 53.4%, Democratic registration majority.

170. The Fourth district, under Act 42, comprises of all of Butler County and of Indiana County, plus pieces of Lawrence, Beaver and Armstrong Counties; as well as certain portions of the Ligonier Valley of Westmoreland County.

171. Act 42 retains more voters in their old congressional district than any plan with equal or lower numerical deviation.

172. The old 25th district, represented by Congressman Atkinson, had a 20% registration advantage. The new district created for incumbent Atkinson has only a 8% Democratic registration advantage.

173. The combined voter registration of the Fourth, 12th and 22d districts is 61% Democratic and 35% Republican.

174. The Fourth district is 51.8% Democratic and 43.2% Republican.

175. The total Democratic percentage for the County of Beaver is 65.1% and the total Republican percentage is 30.9%. Within the Fourth district, which contains a considerable part of Beaver County, Beaver County has 61.1% Democratic and 34.6% Republican.

176. The 12th district and the 21st district under the 1972 configuration were merged into the 12th district.

177. Between 1970 and 1980, the State of Pennsylvania gained .6% population.

178. Under the March, 1981 census figures and the 1980 General Election: The old First district was represented by a Democrat and lost 15.4% population. (Congressman Foglietta was elected as an Independent).

179. The old Second district was represented by a Democrat and lost 17.2% population.

180. The old Third district was represented by a Democrat and lost 16.3% population. (Congressman Smith was elected in a special election on July 21, 1981).

181. The old Fourth district was represented by a Republican and lost 5.4% population.

182. The old Fifth district was represented by a Republican and gained 10.6% population.

183. The old Sixth district was represented by a Democrat and gained 3.2% population.

184. The old Seventh district was represented by a Democrat and lost 10.6% population.

185. The old Eighth district was represented by a Republican and gained 14.0% population.

186. The old Ninth district was represented by a Republican and gained 9.1% population.

187. The old 10th district was represented by a Republican and gained 10.0% population.

188. The old 11th district was represented by a Republican and gained 2.3% population.

189. The old 12th district was represented by a Democrat and gained 4.6% population.

190. The old 13th district was represented by a Republican and lost 3.3% population.

191. The old 14th district was represented by a Democrat and lost 17.6% population.

192. The old 15th district was represented by a Republican and gained 6.2% population.

193. The old 16th district was represented by a Republican and gained 14.5% population.

194. The old 17th district was represented by a Democrat and gained 5.3% population.

195. The old 18th district was represented by a Democrat and lost 6.6% population.

196. The old 19th district was represented by a Republican and gained 14.6% population.

197. The old 20th district was represented by a Democrat and lost 9.6% population.

198. The old 21st district was represented by a Democrat and gained 2.6% population.

199. The old 22d district was represented by a Democrat and gained 4.8% population.

200. The old 23rd district was represented by a Republican and gained 6.5% population.

201. The old 24th district was represented by a Republican and gained 5.2% population.

202. The old 25th district was represented by a Republican and gained 3.4% population. (Congressman Atkinson was elected as a Democrat).

203. There were eight districts gaining more than 6% population, all represented by Republicans.

204. Four Republican districts gained more than 10% population.

205. There were seven districts losing more than 6% population, all represented by Democrats.

206. Four Democratic districts lost more than 15% population.

207. In 1972, the legislature and the governorship were controlled by the Democratic party. In 1982, both the legislature and the governorship were controlled by the Republican party.

208. During the session of the Pennsylvania General Assembly when Act 42 was enacted, the Republican party had a majority in both the Pennsylvania Senate and Pennsylvania House.

209. Act 42 was passed with the support of two Senate Democrats and 22 House Democrats.

210. In 1980, there were 1,047,609 black people in Pennsylvania. (March, 1981 census figures).

211. 638,878 black people, or 61.0% of the state-wide total, were located in the City of Philadelphia.

212. 101,813 black people, or 9.7% of the state-wide total, were located in the City of Pittsburgh.

213. There were only three other political subdivisions in Pennsylvania where the population included more than 10,000 Black people. There were: The City of Chester, 26,009 black people; the City of Harrisburg, 23,215 black people; and the City of Erie, 11,567.

214. 75.6% of Pennsylvania's black population was concentrated in Philadelphia, Pittsburgh, Chester and Harrisburg.

215. Outside the City of Philadelphia, black people are not concentrated in any part of Pennsylvania in sufficient numbers to assemble a congressional district where black people would constitute a majority of the people in the district.

216. There are 13 black state representatives in the Pennsylvania House of Representatives, 12 of whom are Democrats and one of whom is a Republican.

217. Six of the 12 black state representatives who were listed as present on the mast roll call on the date that Act 42 was passed by the House voted against the plan. Included as one of the negative votes is that of Representative Evans, who indicated that he would have voted in the negative had his voting machine been operative.

218. The undercount in the 1980 census is above one percent (1%).

219. The size of the undercount in Pennsylvania is unknown, and no reliable methodology exists for estimating it.

220. The census error for the 1970 census was 2.5% as reported by the Bureau of the Census.

221. Preliminary estimates of the Bureau of the Census show an undercount of blacks by 4.8% and overcount of whites by 1.1% in the 1980 census.

222. With the exception of Plaintiffs Kelley, Ross and Singel, all the other plaintiffs are from congressional districts under the earlier reapportionment, which, according to the 1980 census, were too small to be retained "as is" in the new reapportionment plan.

223. Plaintiff Gerber admitted that he is no longer a candidate for the United States Congress.

224. On January 26, 1982, Wayne Long filed a Complaint against the defendants in this action in the United States District Court for the Western District of Pennsylvania. Paragraph eight (8) of the Long Complaint alleged that the population of Pennsylvania was as reported in the revised census figures of October, 1981. The Complaint further alleged that the ideal Congressional district was as reported in the revised figures of October, 1981.

SELECTED POPULATION CHANGES
1970 to 1980

	1970	*1980*	*Absolute Change*	*Percentage Change*
United States	203,302,031	226,504,825	+23,202,794	+10.1%
Pennsylvania	11,800,766	11,866,728[1]	+65,962	+ 0.6%
City of Philadelphia	1,949,996	1,688,210[1]	−261,786	−13.4%

Source: (1) 1980 Census of Population and Housing Advance Reports, Issued March 1981, PHC 80-V-40.

[1] These figures do not incorporate the revisions which were forwarded to Pennsylvania government by the U.S. Bureau of the Census in October 1981.

Appendix A—Opinion of the United States District Court for the Middle District of Pennsylvania.

RACIAL CHARACTERISTICS PENNSYLVANIA AND SELECTED POLITICAL SUBDIVISIONS

	Total Population	*Black Population*	*% Black Population*
Pennsylvania	11,866,728	1,047,609	8.8%
City of Philadelphia	1,688,210	638,878	37.8%
City of Pittsburgh	423,938	101,813	24.0%
City of Chester	45,794	26,009	56.8%
City of Harrisburg	53,264	23,215	43.6%
Rest of State	9,655,522	257,694	2.7%

Source: 1980 Census of Population and Housing Advance Reports, Issued March 1981, PHC 80-V-40.

NUMERICAL CHARACTERISTICS OF THE THREE CONGRESSIONAL REAPPORTIONAMENT STATUTES ENACTED IN PENNSYLVANIA SINCE *BAKER v. CARR*

	P.L. 1 of 3/8/66 (1960 Census)	*P.L. 7 of 1/25/72*[1] *(1970 Census)*	*Act 42 of 1982 (1980 Census)*
(A) Total Population	11,323,660	11,800,766	11,866,728
(B) Number of Representatives	27	25	23
(C) Ideal Size of Congressional District (A-B)	419,395	472,031	515,944

[1] The figures in this column include the revisions in the 1970 Census figures incorporated up to the publication of the 1980 Census advance reports.

Appendix A—Opinion of the United States District Court for the Middle District of Pennsylvania.

	P.L. 1 of 3/8/66 (1960 Census)	*P.L. 7 of 1/25/72[1] (1970 Census)*	*Act 42 of 1982 (1980 Census)*
(D) Largest Congressional District (Number)	(12th)482,201	(1st)478,310	(21st)516,645
(E) Amount of deviation from ideal size (D-D)	+62,806	+4,279	+701
(F) Smallest Congressional District (Number)	(8th)356,821	(16th)467,811	(9th)515,430
(G) Amount of deviation from ideal size (B-F)	−62,574	−4,220	−514
(H) Total numerical deviation between the largest and smallest Congressional Districts (B+G)	125,380	8,499	1,215
(I) Average Numberical deviation between the largest and smallest Congressional Districts (B+G) -B	4,644	340	253
(J) Total % deviation from the ideal (H-C)	29.8954%	1.8005%	0.2354%

Source: 1980 Census of Population and Housing—PHC 80-V-40 Pennsylvania Manual Vol. 98, 1967, p. 714.

[1] The figures in this column include the revisions in the 1970 Census figures incorporated up to the publication of the 1980 Census advance reports.

APPENDIX B

Opinion of the United States District Court for the Middle District of Pennsylvania

In re PENNSYLVANIA CONGRESSIONAL DISTRICTS REAPPORTIONMENT CASES.

Civ. A. No. 82-0197.

United States District Court,
M. D. Pennsylvania.

March 23, 1982.

Action was instituted by incumbent members of Congress and prospective candidates to challenge constitutionality of the Pennsylvania Reapportionment Plan. On motion for preliminary injunction to delay a primary election, the three-judge District Court held that issuance of preliminary injunction relief to delay a primary election by reason of a congressional reapportionment plan which contained allegedly impermissible population variances and fragmentation of municipalities was not warranted where success in demonstrating that a .3993 percent population deviation was constitutionally impermissible was not likely and aside from expense to public, disruption of campaign organizations, and confusion which would inevitably result if primary was delayed, population shifts were not shown to have caused a significant percentage shift in voter strength.

Motion denied.

1. United States—10

The state must make a good faith effort to achieve precise mathematical equity in congressional reapportionment. U.S.C.A. Const.Art. 1, §2, cl. 3; Amends. 1, 14, 15.

2. United States—10

The federal court is bound in a reapportionment case to accord appropriate recognition to the state legislature's responsibility and its decisions on important state interests. U.S.C.A.Const.Art. 1, §2, cl. 3; Amends. 1, 14, 15.

3. Injunction—137(4)

Issuance of preliminary injunctive relief to delay a primary election by reason of a congressional reapportionment plan which contained allegedly impermissible population variances and fragmentation of municipalities was not warranted where success in demonstrating that a .3993 percent population deviation was constitutionally impermissible was not likely and, aside from expense to public, disruption of campaign organizations, and confusion which would inevitably result if primary was delayed, population shifts were not shown to have caused a significant percentage shift in voter strength. Pa.Acts 1982, March 3, No. 42, §1 *et seq.*; 28 U.S.C.A. §2284(a); U.S.C.A. Const.Art. 1, §2, cl. 3; Amends. 1, 14, 15.

4. Elections—12

A reapportionment plan that is used to minimize or cancel out the voting strength of racial minorities may not pass constitutional muster even if it is acceptable under equal population standards. U.S.C.A.Const. Art. 1, §2, cl. 3; Amends. 1, 14, 15.

Appendix B—Opinion of the United States District Court for the Middle District of Pennsylvania.

Irving L. Bloom, Westmoreland County Sol., Greensburg, Pa., for plaintiffs Ted Simon, John W. Regoli, and Robert H. Miller, individually and as the Board of Com'rs of Westmoreland County, Pa., Clarence H. Carns, Joseph H. Deeds, and Leon T. Smithley, individually and as Bd. of Sup'rs of Ligonier Tp., Westmoreland County, Pa., John E. St. Clair, Homer C. Burkett, individually and as the Bd. of Sup'rs of Fairfield Tp., Westmoreland County, Pa.

Michael T. McCarthy, Chief Counsel to Senate Democratic Floor Leader, Ronald W. Andidora, Asst., Harrisburg, Pa., for plaintiffs James R. Kelley, James E. Ross and Mark S. Singel, State Senator, of Com. of Pa.

William J. Peters, Foulkrod, Peters & Wasilefski, Harrisburg, Pa., David J. Armstrong, Eugene F. Scanlon, Dickie, McCamey & Chilcote, Pittsburgh, Pa., for plaintiffs Doug Walgren, an individual, and the United States Representative of the Eighteenth Congressional Dist. of Com. of Pa., Ross C. Feltz, an individual; and Jese Del Gre, an individual.

Louis J. Adler, Harrisburg, Pa., for plaintiffs intervenors Richard Gerber and Anna M. Miller.

Mary Ellen Krober, Deputy Atty. Gen., Harrisburg, Pa., for defendants William R. Davis, Secretary of the Com. of Pa., Richard Anderson, Com'r of Bureau of Elections for Com. of Pa., Dick Thornburg, Governor of Com. of Pa.

Fred Speaker, Larry L. Miller, Pepper, Hamilton & Sheetz, Harrisburg, Pa., for defendant intervenors The Honorable Joseph M. McDade, The Honorable Lawrence

Coughlin, The Honorable Gus Yatron. The Honorable Bud Shuster, The Honorable William F. Goodling, The Honorable Robert S. Walker, The Honorable William E. Clinger, Jr., The Honorable Donald L. Ritter, The Honorable James K. Coyne, The Honorable Thomas M. Foglietta, and The Honorable Eugene V. Atkinson.

Jack H. France, Murphy, France & Vanderman, Charleroi, Pa., for defendant intervenor Austin J. Murphy.

Before WEIS, Circuit Judge, NEALON, Chief District Judge and RAMBO, District Judge.

PER CURIAM.

The 1980 census revealed a decline in Pennsylvania's population that required the number of congressional districts to be reduced from 25 to 23. After spirited and sometimes acrimonious debate, the state legislature enacted a reapportionment statute which was signed by the Governor. Act of March 3, 1982, P.L. _____, No. 42, (hereafter Act No. 42).

These consolidated cases attack the constitutionality of Act No. 42. Plaintiffs are incumbent members of Congress, prospective candidates, municipal officials, concerned citizens, and others. Additional individuals have been permitted to intervene. The plaintiffs request a declaration that Act No. 42 is unconstitutional and an injunction delaying the primary election that is presently scheduled for May 18, 1982, as well as the general election set for November 2, 1982.

Appendix B—Opinion of the United States District Court for the Middle District of Pennsylvania.

This three-judge court was convened pursuant to 28 U.S.C. §2284(a). After hearing testimony and argument on March 18, 1982, and following submission of briefs on March 22, 1982, we conclude that the request for a preliminary injunction to delay the primary election on May 18, 1982 must be denied. We reach no other issue at this time.

The plaintiffs contend that the reapportionment plan violates Art. I, §2 of the United States Constitution and the First, Fourteenth and Fifteenth Amendments. Specifically they argue, *inter alia*, that there are impermissible population variances and fragmentation of municipalities. In addition, it is asserted that some districts are neither contiguous nor compact, some constituencies have not been preserved, and in certain instances the voting strength of black citizens is diluted.

The legislature began its reapportionment task by utilizing the official census figures published on April 1, 1981. These showed the state's population was 11,866,728. Based on this figure, the ideal size of a congressional district was determined to be 515,944.

After considering various plans, the legislature passed Act 42. It provides for twenty-three districts, the largest of which, the Twenty-first, has 701 persons above the ideal number. The smallest, the Ninth, has 514 below the ideal. The total numerical deviation between the two districts is 1215. Statewide, the average deviation from the ideal is 253 persons. The deviation between the largest and the smallest district on a percentage basis is .2354%.

Appendix B—Opinion of the United States District Court for the Middle District of Pennsylvania.

After the Governor signed Act No. 42, it was discovered that the Census Bureau had sent revised statistics to the state's legislative data processing bureau in October 1981. The revised figures showed a population of 11,863,895 and based on this figure, an ideal district would number 515,821.5 persons. The Twenty-first district would remain the largest, with 824 persons above the ideal number. District Sixteen would become the smallest, with 1,236 persons less than the ideal. The total numerical difference between the districts would be 2,060 with an average statewide deviation of 364. Expressed in percentages, the deviation between the largest and smallest district would change to .3993%.

At the March 18 hearing plaintiffs demonstrated that the distribution of black citizens was changed by Act 42 by relocating the boundaries of the adjoining Fifth and Seventh Congressional Districts. Before reapportionment, the Seventh District contained a 10.6% black population. In the newly created district, that figure was reduced to 5.9%. In the Fifth District, before reapportionment, blacks constituted 4.6% of the population. Act 42 raised the proportion to 11.2%.

Plaintiffs also submitted an offer of proof that a witness would testify that the black population shift between the Fifth and Seventh Districts, although amounting to only 5%, in each instance would have a proportionately greater impact on the effectiveness of the black vote.

In the Fourteenth District, which is the area surrounding the city of Pittsburgh, the percentage of black citizens was reduced by reapportionment from 25.49% to 21.77%.

In Philadelphia, Act 42 reduced the number of districts wholly within the city from four to three. There are two additional districts encompassing part of the suburban areas as well. Before reapportionment, the Second District in the city had a black population of 74.7%. Act 42 raised the proportion to 80%. Before reapportionment the first District's percentage of black citizens was 44.7%. After reapportionment a new First District was created primarily by merger with the old Third. The proportion of black citizens in the new First District was reduced to 32.1%. Plaintiffs contend that the approximately 5% of black persons now included in the Second District should have been placed instead within the First District, raising its proportion to approximately 38%.

Of immediate concern to the court is the request for a preliminary injunction which would delay the primary election set for May 18 now less than two months away. The plaintiffs must show that they have a reasonable probability of success on the merits, they will suffer irreparable harm in the absence of preliminary injunctive relief, and the interest of other affected persons and the general public weigh in favor of issuance of an injunction, or at least do not militate against it. *A. O. Smith v. F.T.C.*, 530 F.2d 515, 525 (3d Cir. 1976).

Some doubt remains whether the legislature was required to consider the census revision of October 1981 or whether it was restricted to the April 1981 version which yielded a population deviation of .2354%. Without ruling on the question, we shall apply the figures more favorable to the plaintiffs' cause—those produced by the revisions of October 1981. These figures show a deviation of .3993%.

[1] The Supreme Court has stated that in congressional reapportionment, the state must "make a good-faith effort to achieve precise mathematical equality." *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31, 89 S.Ct. 1225, 1228-29, 22 L.Ed.2d 519 (1969) (citation omitted). The Court warned that "to consider a certain range of variances *de minimis* would encourage legislators to strive for that range rather than for equality as nearly as practicable." *Id.* at 531, 89 S.Ct. at 1229.

Despite its unwillingness to require less than absolute perfection, the Court tolerated deviations. For example, in *White v. Weiser*, 412 U.S. 783, 93 S.Ct. 2348, 37 L.Ed.2d 335 (1973), the court agreed with the district court that a deviation of 4.13% was unacceptable, but held that a plan having a deviation of .149% was permissible.

In no case cited to us has a plan with a deviation as low as .3993% been found to be constitutionally infirm. Indeed, we note that in *Karcher v. Daggett*, _____ U.S._____, 102 S.Ct. 1298, 71 L.Ed.2d 635 (1982), Justice Brennan (Circuit Justice for the Third Circuit) granted a stay of an injunction against implementation of a New Jersey congressional redistricting plan where the population deviation was .6984%. *See Daggett v. Kimmelman*, 535 F. Supp. 978 (D.N.J.1982)(Three-Judge Court). It is significant that, when granting the stay, Justice Brennan, the author of *Kirkpatrick v. Preisler*, noted that he believed that "there is a fair prospect of reversal" in *Daggett, supra*, 102 S.Ct. at 1300.

The *Daggett* stay order also reminded the judiciary that, "this Court has repeatedly emphasized that legislative apportionment plans are to be preferred to judicially constructed plans." *Id.* Similarly, in *White v. Weiser*, the Court said that "state legislatures have 'primary jurisdiction' over legislative reapportionment" so that "in fashioning a reapportionment plan or in choosing among plans, a district court should not preempt the legislative task nor 'intrude upon state policy any more than necessary.' " 412 U.S. at 795, 93 S.Ct. at 2354. (Citation omitted.)

[2] Thus, in addition to requiring the plaintiffs to meet the usual prerequisites for the grant of a preliminary injunction, we are bound to accord appropriate recognition to the legislature's responsibility and its decisions on important state interests.

In analyzing the plaintiffs' request for a preliminary injunction, the court must weight the relative harms to the parties and the interests of the public at large. In this regard, the plaintiffs presented some evidence at the March 18 hearing and were given an opportunity to proffer other evidence in support of their positions.

With respect to balancing the equities, this court must consider the expense to the public, the disruption of campaign organizations, and the confusion which would inevitably result if at this late date the congressional primary were to be delayed. The parties agree that the costs of holding a special election would be approximately $6 million. The court also takes judicial notice that in addition to electing United States Representatives, Pennsylvania voters will be voting for nominees for Governor,

Lieutenant Governor, one United States Senator, one State Supreme Court Justice, one-half of the Pennsylvania state senatorial seats and all state house seats.

In weighing the relative harms to the parties this court is guided by *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), which established the perimeters for remedial action in apportionment cases.

> [O]nce a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan. However, under certain circumstances, *such as where an impending election is imminent and a State's election machinery is already in progress*, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, *even though the existing apportionment scheme was found invalid.* In awarding or withholding immediate relief, *a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles.* With respect to the timing of a relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree. *Id.*, at 585-86, 84 S.Ct. at 1393-94 (emphasis supplied).

The Supreme Court in *Reynolds* went on to approve the district court's having declined to stay the "impending primary election" that was conducted pursuant to a reapportionment plan that the district court had found unconstitutional. *Id.* at 586, 84 S.Ct. at 1394. *See* also, *White v. Weiser,* 412 U.S. at 789, 93 S.Ct. at 2351; *Kirkpatrick v. Preisler,* 394 U.S. at 530, 89 S.Ct. at 1228.

[3] In weighing the public interest and assessing the likelihood of plaintiffs' demonstrating that a .3993% population deviation is constitutionally impermissible, we conclude that a preliminary injunction should not be granted to enjoin the primary election.

[4] Somewhat different considerations come into play in appraising the claims of racial discrimination. A reapportionment plan that is used to minimize or cancel out the voting strength of racial minorities may not pass constitutional muster even if it is acceptable under equal population standards. *See Gaffney v. Cummings,* 412 U.S. 735, 751, 93 S.Ct. 2321, 2330, 37 L.Ed.2d 298 (1972) (legislative reapportionment). The evidence and offers on the racial allegations in the case before us are not of such dimensions as to outweigh the public's interest in allowing the primary election to proceed on schedule.

The population shifts in the Seventh, Ninth and Fourteenth Districts have not caused a significant percentage shift in voter strength. Further, although plaintiffs suggested an alteration in the First District in Philadelphia which would raise the black percentage from 32.1 to 38%, it would still leave a figure substantially below a majority. On the other hand, the majority which the

black citizens enjoyed in the Second District in Philadelphia is continued and enhanced in the reapportionment plan under consideration. Thus, although the plaintiffs have raised questions which merit serious consideration, the evidence produced and proffered, when weighed against the public interest in having the May primary continue on schedule, is not sufficient to warrant the entry of a preliminary injunction.

It is important that the parties understand the limited nature of our order. We do not pass on the constitutionality of Act No. 42. At this time we decide only that we will not grant a preliminary injunction postponing the May primary. Whether a permanent injunction is appropriate will be determined after further proceedings in accordance with instructions to be issued by this court.

APPENDIX C

Notice of Appeal to the Supreme Court of the United States

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

IN RE: PENNSYLVANIA CONGRESSIONAL DISTRICTS REAPPORTIONMENT CASES.

Civil Action No. 82-0197

Notice is hereby given that Ted Simon, et al., the Plaintiff, hereby appeals to the Supreme Court of the United States from the final order denying relief and dismissing the Complaint entered in this action on 13 September, 1982.

This appeal is taken pursuant to Title 28, United States Code, Section 1253.

Dated 2 October 1982.

IRVING L. BLOOM
Irving L. Bloom, Solicitor
Westmoreland County
102 Courthouse Square
Greensburg, PA 15601
Attorney for Plaintiff
Ted Simon, et al.
(412) 834-2191, Ext. 3145

FILED
HARRISBURG, PA.
OCT 13 1982
DONALD R. BERRY, CLERK
PER_____
Deputy Clerk

Appendix C—Notice of Appeal to the Supreme Court of the United States.

CERTIFICATE OF SERVICE BY MAIL

I, Irving L. Bloom, a member of the Bar of the Supreme Court of the United States and counsel of record for Ted Simon, et al., appellant herein, hereby certify that on October 8, 1982, pursuant to Rule 28, Rules of the Supreme Court, I served a copy of the attached notice of appeal on each of the parties herein, as follows:

On Secretary of the Commonwealth of Pennsylvania, William Davis, et al., appellee herein, by depositing such copies in the United States Post Office, Greensburg, Pennsylvania, with first class postage prepaid, properly addressed to the post office address of Mary Ellen Krober, Esquire, Deputy Attorney General, Office of the Attorney General, Department of Justice, the above-named appelle's counsel of record at 16th Floor, Strawberry Square, Third and Walnut Streets, Harrisburg, Pennsylvania 17101.

On Congressman McDade, et al., defendant-intervenors, appellee herein, by depositing such copies in the United States Post Office, Greensburg, Pennsylvania, with first class postage prepaid, properly addressed to the post office address of Fred Speaker, Esquire, Pepper, Hamilton and Scheetz, Attorney for the above-named appelle at 10 South Market Square, P.O. box 1181, Harrisburg, Pennsylvania 17108.

On Anna Miller, Plaintiff-Intervenor, by depositing such copies in the United States Post Office, Greensburg, Pennsylvania, with first class postage prepaid, properly addressed to the post office address of Louis Adler, Esquire, the above-named party's counsel of

record at [25 Locust Street, P.O. Box 751, Harrisburg, Pennsylvania 17108.

On James R. Kelley, et al., Plaintiffs, by depositing such copies in the United States Post Office, Greensburg, Pennsylvania, with first class postage prepaid, properly addressed to the post office address of Michael T. McCarthy, Esquire, the above-named party's counsel of record at 535 Main Capitol Building, Harrisburg, Pennsylvania 17120.

On Douglas Walgren, et al., Plaintiffs, by depositing such copies in the United States Post Office, Greensburg, Pennsylvania, with first class postage prepaid, properly addressed to the post office address of Eugene F. Scanlon, Jr., Esquire, the above-named party's counsel of record at 3180 United States Steel Building, Pittsburgh, Pennsylvania 15219.

All parties required to be served have been served.

Dated 8 October 1982.

IRVING L. BLOOM
Irving L. Bloom, Esquire
Solicitor of Westmoreland County
Attorney for Appellants Simon, et al
102 Courthouse Square
Greensburg, PA 15601

(412) 834-2191, Ext. 3145

APPENDIX D

Laws of Pennsylvania, Act 1982-42

AN ACT

HB 1437

Amending the act of June 3, 1937 (P.L.1333, No.320) entitled "An act concerning elections, including general, municipal, special and primary elections, the nomination of candidates, primary and election expenses and election contests; creating and defining membership of county boards of elections; imposing duties upon the Secretary of the Commonwealth, courts, county boards of elections, county commissioners; imposing penalties for violation of the act, and codifying, revising and consolidating the laws relating thereto; and repealing certain acts and parts of acts relating to elections," apportioning the Commonwealth into congressional districts and delaying the time periods relating to nominations for the Office of Representative in Congress.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 953, act of June 3, 1937 (P.L.1333, No.320), known as the "Pennsylvania Election Code," is amended by adding a subsection to read:

Section 953. Place and Time of Filing Nomination Papers.

* * *

(e) For the primary election in the year 1982, the time schedule relating to circulating and filing of nominating petitions, filing of objections, and casting of lots for position on the ballot or ballot labels for the Office of Representative in Congress shall be delayed twenty-one (21) days from the times otherwise specified in this act and the time for withdrawal of candidates for such office shall be delayed fourteen (14) days from the time otherwise specified in this act.

Section 2. The act is amended by adding an article to read:

ARTICLE XVIII-A
Congressional Districts

Section 1801-A. Districts.—For the purpose of electing representatives of the people of Pennsylvania to serve in the House of Representatives in the Congress of the United States, this Commonwealth shall be divided into 23 districts which shall have one Congressman each, as follows:

The First District shall consist of Wards 1, 2, 5, 7, 13, 14, 15, 18, 19, 20, 25, 26, 27 and 30 (Divisions 4, 5, 10, 11, 12, 13, 14, 16, 17 and 18), 31, 36, 37, 39 and 42 (Divisions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24), 43, 47, 48 and 49 of the City of Philadelphia of Philadelphia County.

The Second District shall consist of Wards 3, 4, 6, 8 and 9 (Divisions 1, 2, 3, 14 and 15), 11, 12, 16, 17, 22, 24, 28, 29 and 30 (Divisions 1, 2, 3, 6, 7, 8, 9, 15, 19, 20 and 21), 32 and 34 (Divisions 1, 2, 3, 4, 5, 6, 7, 9, 10, 36, 38 and 43), 38 and 40 (Division 2), 44, 46, 50, 51, 52, 59 and 60 of the City of Philadelphia of Philadelphia County.

The Third District shall consist of Wards 10, 23, 33, 35, 41 and 42 (Division 25), 45, 53, 54, 55, 56, 57, 58, 61, 62, 63, 64, 65 and 66 of the City of Philadelphia of Philadelphia County.

The Fourth District shall consist of the Townships of Bethel, Burrell, Cadogan, East Franklin, Gilpin, Kittanning, Madison, North Buffalo, Parks, Plumcreek, South Bend, South Buffalo, Sugarcreek, Washington and West Franklin, and the Boroughs of Applewold, Elderton, Freeport, Kittanning, Leechburg, West Kittanning and Worthington of Armstrong County; the City of Beaver Falls, the Townships of Brighton, Chippewa, Darlington, Daugherty, Franklin, Greene, Harmony, Marion, New Sewickley, North Sewickley, Patterson, Pulaski, South Beaver, Vanport and White, and the Boroughs of Aliquippa, Baden, Beaver, Big Beaver, Bridgewater, Conway, Darlington, Eastvale, Economy, Ellwood City (Beaver County Portion), Fallston, Georgetown, Glasgow, Homewood, Hookstown, Koppel, New Brighton, New Galilee, Ohioville, Patterson Heights and West Mayfield of Beaver County; Butler County; Indiana County; the City of New Castle, the Townships of Little Beaver, Mahoning, North Beaver, Perry, Plain Grove, Pulaski, Shenango, Taylor, Union, Wayne and Wilmington, and the Boroughs of Bessemer, Ellport, Ellwood City (Lawrence County Portion), Enon Valley, New Beaver, Snpj, South New Castle, Volant and Wampum of Lawrence County; and the Townships of Fairfield, Ligonier, and the Boroughs of Bolivar and Ligonier of Westmoreland County.

The Fifth District shall consist of the City of Coatesville, the Townships of Birmingham, Caln, Charlestown, East Bradford, East Brandywine, East Caln, East Fallowfield, East Goshen, East Marlborough, East Pikeland, East Whiteland, Easttown, Franklin, Kennett, London Britain, London Grove, New Garden, Newlin, Pennsbury, Pocopson, Schuylkill, Thornbury, Tredyffrin, Uwchlan, Valley, West Bradford, West Brandywine, West Goshen, West Marlborough, West Pikeland, West Whiteland, Westtown and Willistown, and the Boroughs of Avondale, Downingtown, Kennett Square, Malvern, Modena, Phoenixville, South Coatesville, West Chester and West Grove of Chester County; the City of Chester, the Townships of Bethel, Birmingham, Chester, Concord, Lower Chichester, Thornbury and Upper Chichester, and the Boroughs of Marcus Hook and Trainer of Delaware County; the Townships of Douglass, East Norriton, Franconia, Hatfield, Limerick, Lower Frederick, Lower Pottsgrove, Lower Providence, Marlborough, New Hanover, Perkiomen, Salford, Skippack, Upper Frederick, Upper Hanover, Upper Pottsgrove, Upper Providence, Upper Salford, West Norriton and West Pottsgrove, and the Boroughs of Collegeville, East Greenville, Green Lane, Hatfield, Pennsburg, Pottstown, Red Hill, Royersford, Schwenksville, Souderton, Telford (Montgomery County Portion) and Trappe of Montgomery County.

The Sixth District shall consist of Berks County; the Townships of Banks and Packer, and the Boroughs of Beaver Meadows, Lansford,

Nesquehoning and Summit Hill of Carbon County; the Townships of Caernarvon, East Earl, Brecknock, East Cocalico, and West Cocalico, and the Boroughs of Adamstown, Denver and Terre Hill of Lancaster County; and Schuylkill County.

The Seventh District shall consist of the Townships of Aston, Darby, Edgemont, Haverford, Marple, Middletown, Nether Providence, Newtown, Radnor, Ridley, Springfield, Tinicum, Upper Darby and Upper Providence, and the Boroughs of Aidan, Brookhaven, Chester Heights, Clifton Heights, Collingdale, Colwyn, Darby, East Lansdowne, Eddystone, Folcroft, Glenolden, Lansdowne, Media, Millbourne, Morton, Norwood, Parkside, Prospect Park, Ridley Park, Rose Valley, Rutledge, Sharon Hill, Swarthmore, Upland and Yeadon of Delaware County; Ward 40 (Divisions 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55 and 56) of the City of Philadelphia of Philadelphia County.

The Eighth District shall consist of Bucks County; the Townships of Lower Moreland and Districts 1, 2 (Division 1), 3, 4, 5, 6 and 7 of Upper Moreland, and the Borough of Bryn Athyn of Montgomery County.

The Ninth District shall consist of Bedford County; Blair County; the Townships of Chest, Clearfield, Dean, Elder, Reade, Susquehanna and White, and the Boroughs of Hastings and Patton of Cambria County; the Townships of Beccaria, Bell, Bigler, Bloom, Boggs, Brady, Burnside, Chest, Cooper, Decatur, Ferguson, Greenwood, Gulich, Jordan, Knox, Morris, Penn, Pike and Woodward, and the Boroughs of Brisbin, Burnside, Chester Hill, Coalport, Curwensville, Glenhope, Grampian, Houtzdale, Irvona, Lumber City, Mahaffey, New Washington, Newburg, Osceola, Ramey, Troutville, Wallaceton and Westover of Clearfield County; the Townships of Cooke, Dickinson, Hopewell, Lower Frankford, Lower Mifflin, Monroe, North Newton, Penn, Shippensburg, South Middleton, South Newton, Southampton, Upper Frankford and Upper Mifflin, and the Boroughs of Mt. Holly Springs, Newburg, Newville and Shippensburg (Cumberland County Portion) of Cumberland County; Franklin County; Fulton County; Huntingdon County; Juniata County; and Mifflin County.

The Tenth District shall consist of Bradford County; the Townships of Chapman, Colebrook, Gallagher, Grugan, Leidy, Noyes and Woodward, and the Boroughs of Renovo and South Renovo of Clinton County; Lackawanna County; the Townships of Jackson, Middle Smithfield, Paradise, Pocono, Price, Smithfield and Stroud, and the Boroughs of Delaware Water Gap, East Stroudsburg and Stroudsburg of Monroe County; Pike County; Potter County; Susquehanna County; Tioga County; Wayne County; and Wyoming County.

The Eleventh District shall consist of the Townships of East Penn, Franklin, Kidder, Lausanne, Lehigh, Lower Towamensing, Mahoning, Penn Forest and Towamensing, and the Boroughs of Bowmanstown, East Side, Jim Thorpe, Lehighton, Palmerton, Parryville, Weatherly

and Weissport of Carbon County; Columbia County; Luzerne County; the Townships of Barrett, Coolbaugh and Tobyhanna, and the Borough of Mt. Pocono of Monroe County; Montour County; the City of Shamokin, the Townships of Coal, East Cameron and Mt. Carmel, and the Boroughs of Kulpmont, Marion Heights and Mt. Carmel of Northumberland County; and Sullivan County.

The Twelfth District shall consist of the Township of Kiskiminetas, and the Boroughs of Apollo and North Apollo of Armstrong County; the City of Johnstown, the Townships of Adams, Allegheny, Barr, Blacklick, Cambria, Conemaugh, Cresson, Croyle, East Carroll, East Taylor, Gallitzin, Jackson, Lower Yoder, Middle Taylor, Munster, Portage, Richland, Stonycreek, Summerhill, Upper Yoder, Washington, West Carroll and West Taylor, and the Boroughs of Ashville, Barnesboro, Brownstown, Carrolltown, Cassandra, Chest Springs, Cresson, Daisytown, Dale, East Conemaugh, Ebensburg, Ehrenfeld, Ferndale, Franklin, Gallitzin, Geistown, Lilly, Lorain, Loretto, Nanty Glo, Portage, Sankertown, Scalp Level, South Fork, Southmont, Spangler, Summerhill, Tunnelhill (Cambria County Portion), Vintondale, Westmont and Wilmore of Cambria County; Somerset County; the Cities of Greensburg and Jeannette, the Townships of Bell, Cook, Derry, Donegal, Hempfield, Loyalhanna, Mt. Pleasant, North Huntingdon, Penn, Salem, St. Clair, Unity and Washington, and the Boroughs of Adamsburg, Arona, Avonmore, Delmont, Derry, Donegal, Export, Hunker, Irwin, Latrobe, Madison, Manor, Murrysville, New Alexandria, New Florence, New Stanton, North Irwin, Penn, Seward, South Greensburg, Southwest Greensburg, Youngstown and Youngwood of Westmoreland County.

The Thirteenth District shall consist of the Townships of Abington, Cheltenham, Horsham, Lower Gwynedd, Lower Merion, Lower Salford, Montgomery, Plymouth, Springfield, Towamencin, Upper Dublin, Upper Gwynedd, Upper Merion, District 2 (Division 2) of Upper Moreland, Whitemarsh, Whitpain and Worcester, and the Boroughs of Ambler, Bridgeport, Conshohocken, Hatboro, Jenkintown, Lansdale, Narberth, Norristown, North Wales, Rockledge and West Conshohocken of Montgomery County; Wards 9 (Divisions 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 16 and 17), 21 and 34 (Divisions 8, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 39, 40, 41 and 42) of the City of Philadelphia of Philadelphia County.

The Fourteenth District shall consist of the City of Pittsburgh, the Townships of Baldwin, Kennedy, Neville, Reserve and Stowe, and the Boroughs of Castle Shannon, Coraopolis, Ingram, McKees Rocks, Millvale, Mt. Oliver, Sharpsburg and Wilkinsburg of Allegheny County.

The Fifteenth District shall consist of Lehigh County; Northampton County; and the Townships of Chestnuthill, Eldred, Hamilton, Polk, Ross and Tunkhannock of Monroe County.

The Sixteenth District shall consist of the Townships of East Nottingham, East Coventry, East Nantmeal, East Vincent, Elk, High-

land, Honeybrook, Londonderry, Lower Oxford, New London, North Coventry, Penn, Sadsbury, South Coventry, Upper Oxford, Upper Uwchlan, Wallace, Warwick, West Caln, West Fallowfield, West Nantmeal, West Nottingham, West Sadsbury and West Vincent, and the Boroughs of Atglen, Elverson, Honey Brook, Oxford, Parkesburg and Spring City of Chester County; the City of Lancaster, the Townships of Bart, Clay, Colerain, Conestoga, Conoy, Drumore, Earl, East Donegal, East Drumore, East Hempfield, East Lampeter, Eden, Elizabeth, Ephrata, Fulton, Lancaster, Leacock, Little Britain, Manheim, Manor, Martic, Mt. Joy, Paradise, Penn, Pequea, Providence, Rapho, Sadsbury, Salisbury, Strasburg, Upper Leacock, Warwick, West Donegal, West Earl, West Hempfield and West Lampeter, and the Boroughs of Akron, Christiana, Columbia, East Petersburg, Elizabethtown, Ephrata, Lititz, Manheim, Marietta, Millersville, Mountville, Mt. Joy, New Holland, Quarryville and Strasburg of Lancaster County; and Lebanon County.

The Seventeenth District shall consist of Dauphin County; Lycoming County; the City of Sunbury, the Townships of Delaware, East Chillisquaque, Jackson, Jordan, Lewis, Little Mahanoy, Lower Augusta, Lower Mahanoy, Point, Ralpho, Rockefeller, Rush, Shamokin, Turbot, Upper Augusta, Upper Mahanoy, Washington, West Cameron, West Chillisquaque and Zerbe, and the Boroughs of Herndon, McEwensville, Milton, Northumberland, Riverside, Snydertown, Turbotville and Watsontown of Northumberland County; Perry County; Snyder County; and Union County.

The Eighteenth District shall consist of the Townships of Aleppo, Crescent, Findlay, Hampton, Kilbuck, Leet, Marshall, McCandless, Moon, Mt. Lebanon, North Fayette, O'Hara, Ohio, Penn Hills, Pine, Richland, Robinson, Ross, Scott, Shaler, South Park and Upper St. Clair, and the Boroughs of Aspinwall, Avalon, Bell Acres, Bellevue, Ben Avon, Ben Avon Heights, Bethel Park, Blawnox, Braddock Hills, Bradford Woods, Carnegie, Churchill, Crafton, Dormont, Edgewood, Edgeworth, Emsworth, Etna, Forest Hills, Fox Chapel, Franklin Park, Glenfield, Green Tree, Haysville, Jefferson, Osborne, Pennsbury Village, Pleasant Hills, Rosslyn Farms, Sewickley, Sewickley Heights, Sewickley Hills, Thornburg, West Elizabeth, West View and Whitehall of Allegheny County.

The Nineteenth District shall consist of Adams County; the Townships of East Pennsboro, Hampden, Lower Allen, Middlesex, North Middleton, Silver Spring, Upper Allen and West Pennsboro, and the Boroughs of Camp Hill, Carlisle, Lemoyne, Mechanicsburg, New Cumberland, Shiremanstown, West Fairview and Wormleysburg of Cumberland County; and York County.

The Twentieth District shall consist of the Cities of Clairton, Duquesne and McKeesport, the Townships of East Deer, Elizabeth, Fawn, Forward, Frazer, Harmar, Harrison, Indiana, North Versailles, South Versailles, Springdale, West Deer and Wilkins, and the Boroughs

of Baldwin, Brackenridge, Braddock, Brentwood, Chalfant, Cheswick, Dravosburg, East McKeesport, East Pittsburgh, Elizabeth, Glassport, Homestead, Liberty, Lincoln, Monroeville, Munhall, North Braddock, Oakmont, Pitcairn, Plum, Port Vue, Rankin, Springdale, Swissvale, Tarentum, Trafford (Allegheny County Portion), Turtle Creek, Verona, Versailles, Wall, West Homestead, West Mifflin, Whitaker, White Oak and Wilmerding of Allegheny County; the Cities of Arnold, Lower Burrell, Monessen and New Kensington, the Townships of Allegheny, East Huntingdon, Rostraver, Sewickley, South Huntingdon and Upper Burrell, and the Boroughs of East Vandergrift, Hyde Park, Mt. Pleasant, North Belle Vernon, Oklahoma, Scottdale, Smithton, Sutersville, Trafford (Westmoreland County Portion), Vandergrift, West Leechburg and West Newton of Westmoreland County.

The Twenty-first District shall consist of Crawford County; Erie County; the Townships of Hickory, Neshannock, Scott, Slippery Rock and Washington, and the Borough of New Wilmington of Lawrence County; and Mercer County.

The Twenty-second District shall consist of the Townships of Collier and South Fayette, and the Boroughs of Bridgeville, Heidelberg, Leetsdale, McDonald (Allegheny County Portion) and Oakdale of Allegheny County; the Townships of Center, Hanover, Hopewell, Independence, Potter, Raccoon and Rochester, and the Boroughs of Ambridge, East Rochester, Frankfort Springs, Freedom, Industry, Midland, Monaca, Rochester, Shippingport and South Heights of Beaver County; Fayette County; Greene County; and Washington County.

The Twenty-third District shall consist of the Townships of Boggs, Bradys Bend, Cowanshannock, Hovey, Mahoning, Manor, Perry, Pine, Rayburn, Redbank, Valley and Wayne, and the Boroughs of Atwood, Dayton, Ford City, Ford Cliff, Manorville, Parker City, Rural Valley and South Bethlehem of Armstrong County; Cameron County; Centre County; Clarion County; the City of Dubois, the Townships of Bradford, Covington, Girard, Goshen, Graham, Huston, Karthaus, Lawrence, Pine, Sandy and Union, and the Boroughs of Clearfield and Falls Creek (Clearfield County Portion) of Clearfield County; the City of Lock Haven, the Townships of Allison, Bald Eagle, Beech Creek, Castanea, Crawford, Dunnstable, East Keating, Greene, Lamar, Logan, Pine Creek, Porter, Wayne and West Keating, and the Boroughs of Avis, Beech Creek, Flemington, Loganton and Mill Hall of Clinton County; Elk County; Forest County; Jefferson County; McKean County; Warren County; and Venango County.

Section 1802-A. Elections; Vacancies.—The first election under this article shall be held at the primary election in the year 1982.

The members of Congress now in office shall continue in such office until the expiration of their respective terms.

Vacancies now existing or happening after the passage of this article and before the commencement of the terms of the members elected at the election of 1982 shall be filled for the unexpired terms from the districts

provided by the act of January 25, 1972 (P.L.7, No.3), entitled "An act to apportion the Commonwealth of Pennsylvania into congressional districts in conformity with constitutional requirements; and providing for the nomination and election of Congressmen."

Section 1803-A. Omissions.—In the event any political subdivision or part thereof should be omitted in the description of the congressional districts, such political subdivision or part thereof shall be included as a part of the congressional district which completely surrounds it. Should any omitted political subdivision or part thereof be not completely surrounded by one congressional district, it shall become a part of that congressional district to which it is contiguous, or if there are two or more such contiguous districts, it shall become a part of that congressional district contiguous thereto which has the least population.

Section 3. (a) The act of January 25, 1972 (P.L.7, No.3), entitled "An act to apportion the Commonwealth of Pennsylvania into congressional districts in conformity with constitutional requirements; and providing for the nomination and election of Congressmen," is repealed except as to the filling of vacancies under the provisions of section 1802-A.

(b) All other acts and parts of acts are repealed insofar as they are inconsistent herewith.

Section 4. This act shall take effect immediately and shall supersede any other congressional redistricting plan which may be or has been adopted by any Commonwealth or United States court having jurisdiction over the Commonwealth.

APPROVED—The 3rd day of March, A. D. 1982.

DICK THORNBURGH

Office-Supreme Court, U.S.
FILED
JAN 27 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1059

In the Supreme Court of the United States

October Term, 1982

TED SIMON, et al.,
Appellants

vs.

WILLIAM R. DAVIS, Secretary of the Commonwealth of Pennsylvania and RICHARD THORNBURGH, Governor of the Commonwealth of Pennsylvania,
Appellees

On Appeal From the United States District Court for the Middle District of Pennsylvania.

MOTION TO AFFIRM OF APPELLEES DAVIS AND THORNBURGH

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MOTION TO AFFIRM

Appellees William R. Davis, Secretary of the Commonwealth of Pennsylvania, and Dick Thornburgh, Governor of the Commonwealth of Pennsylvania, by their attorneys, hereby ask this Court to affirm the decision of the United States District Court for the Middle District of Pennsylvania, dated September 13, 1982, on the grounds that the questions upon which the decision of this case depends are so insubstantial as not to require further argument.

ARGUMENT

I. THE DIVISION OF WESTMORELAND COUNTY AMONG THREE CONGRESSIONAL DISTRICTS DOES NOT VIOLATE ANY PROVISION OF THE CONSTITUTION

In re-districting the Commonwealth for the 1980's, Pennsylvania's Act 42 divides Westmoreland County among three congressional districts. App. to Juris. Statement at 47a. The appellants have challenged the constitutionality of this division on several grounds, none of which finds any support in the Constitution or the decisions of this Court.

A common thread in the appellants' various arguments is their contention that congressional districts, in addition to being of substantially equal population, must also provide a "meaningful relationship" between Representatives and their constituents. Juris. Statement at 12; *id.* at 8, 16. This in turn, they say, requires districts that are compact, contiguous "political communities," *id.* at 12-16, as opposed to the districts in Act 42, which they characterize as "illogical, irrational, and . . . not . . . political communities with any meaning." *Id.* at 8.

Whatever may be the merits of this contention as a matter of social science theory, it has no basis in the Constitution. The Constitution does not require the States to draw compact districts, or contiguous districts, or "meaningful" districts; the Constitution does not require that there be districts at all. At-large congressional elections

were widespread in the early years of the United States, *Wesberry v. Sanders,* 376 U.S. 1, 8 (1964), and the practice survived in some states at least into the 1960's. *Id.*, 376 U.S., at 20, n. 1 (Harlan, J., dissenting).

Furthermore, the districts in question are neither illogical nor irrational. As the District Court said, their configurations resulted from "the legislature's decision . . . to provide some assistance to a Republican incumbent in his contest with his Democratic opponent." App. to Juris. Statement at 23a. Drawing district lines so as to preserve an incumbent's seniority advances a rational and legitimate state interest recognized by this Court. *White v. Weiser,* 412 U.S. 783, 791 (1973).

The District Court correctly pointed out that

> The Supreme Court has often reminded the federal courts that "state legislatures have primary jurisdiction over legislative reapportionment." *White v. Weiser,* 412 U.S. at 795. "Districting inevitably has sharp political impact and inevitably political decisions must be made by those charged with the task." *Id.* at 796. "Politics and political considerations are inseparable from districting and apportionment." *Gaffney v. Cummings,* 412 U.S. at 753.

App. to Juris. Statement at 23a-24a. Accordingly, this Court has overturned legislative redistricting plans only when necessary to vindicate some right explicitly guaranteed by the Constitution. *See Wesberry v. Sanders, supra* (equality of representation); *Gomillion v. Lightfoot,* 364 U.S. 339 (1960) (racial gerrymandering). Otherwise, "a State is constitutionally free to redraw political boundaries in any manner it chooses." *Mobile v. Bolden,* 446 U.S. 55, 63 (1980).

In contrast to this approach, the appellants would have this Court engraft onto the Constituion their own predilections as to "sound districting principles" and "democratic theory." Juris. Statement at 12, 13. Those contentions are so devoid of substance as not to require further argument.

A second common thread in the appellants' arguments is their contention that Act 42 somehow deprives them of their rights under the First Amendment, especially of their right to freedom of association. Juris. Statement at 7, 12, 16-17. At first glance, this seems to be a variation on *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980), in which this Court held that, with some exceptions, public employees could not be discharged because of their partisan political affiliations. *See* Juris. Statement at 16.

Elrod and *Branti* thus involved the use of the power of government to punish those who belonged to the "wrong" party, and it might seem that the appellants are arguing that the drawing of district lines with an eye toward obtaining a partisan political advantage infringes on the First Amendment rights of members of the "out" party. But this is not so. As the District Court found, Act 42 was enacted by a Republican legislature, in part to aid a Republican incumbent, App. to Juris. Statement at 4a, 23a, and the appellants emphasize that they themselves are also Republicans Juris. Statement at 9.

The analogy to *Elrod* is therefore inappropriate. Moreover, the appellants never specify in what manner they believe their First Amendment rights to have been violated, nor do they describe the nature of the associations which have been interfered with. This argument is therefore also without substance.

II. ACT 42 DOES NOT EMBODY EXCESSIVE POPULATION DEVIATIONS

Relying on *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), the appellants argue that Act 42 should be set aside solely because there existed alternative plans with smaller population deviations. Juris. Statement at 18. The appellants ignore the fact that the deviation between the largest and smallest districts under Act 42 is only .2354% —a figure that the District Court found could have "only a miniscule, immeasurable effect on relative representation." *Id.* at 17a, 31a-32a. They ignore also the fact that the plan with the lowest population variances was only .1459% lower than Act 42—a proposal that differed from Act 42 "in only an extremely minor degree." *Id.* at 15a. *See id.* at 15a-18a.[1]

They ignore, finally, the fact that the six plans considered by the legislature which had lower population deviations than Act 42 were not identical in other respects. They had varying impacts on the voting power of racial minorities, and they had varying impacts on the existing relationships between incumbents and their constituents.

[1] In addition, both this Court and the District Court have recognized the inherent limitations of the census data which serve as the basis for re-districting decisions. The census measures total population, not voters, and it does so only on a given day. Even as to that day, the census figures are inaccurate by at least one percent; every day thereafter, births, deaths and migrations increase that inaccuracy. App. to Juris. Statement at 12a-13a, *citing Gaffney v. Cummungs*, 412 U.S. 735 (1973). To erect a structure of "arithmetical absolutism" on such an imprecise foundation is, as the District Court said, a "dubious exercise." App. to Juris. Statement at 14a.

Id. at 4a, 34a (Finding 25), 35a (Finding 31), 36a-37a (Finding 42), 40a (Finding 61), 44a (Finding 96), 49a (Finding 131), 54a (Finding 171). *See United Jewish Organizations v. Carey*, 430 U.S. 144 (1977) (racial factors appropriately taken into account in districting); *White v. Weiser, supra* (state's interest in maintaining representative-constituent relationship not to be disparaged).

The accommodation of these interests is preeminently a legislative function, especially when the choice is among plans which differ from each other only marginally. The District Court recognized this. App. to Juris. Statement at 15a. The appellants' mechanical application of *Kirkpatrick*, on the other hand, reduces this Court's decisions to "a scholastic obsession with abstract numbers [and] a rigid insensitivity to the political realities of the reapportionment process." *White v. Regester*, 412 U.S. 755, 780-81 (1973) (Brennan, J., dissenting).

CONCLUSION

For the foregoing reasons, Appellees William R. Davis and Dick Thornburgh ask this Court to affirm the order of the court below.

Respectfully submitted,

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Date: January 25, 1983

Supreme Court, U.S.
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No. 82-1080

IN THE

Supreme Court of the United States

October Term, 1982

TED SIMON, et al.

v.

WILLIAM R. DAVIS, Secretary of the Commonwealth of Pennsylvania and RICHARD THORNBURGH, Governor of the Commonwealth of Pennsylvania.

On Appeal From the United States District Court for the Middle District of Pennsylvania.

MOTION TO DISMISS OR AFFIRM OF APPELLEES HON. JOSEPH M. McDADE, HON. LAWRENCE COUGHLIN, HON. GUS YATRON, HON. BUD SHUSTER, HON. WILLIAM F. GOODLING, HON. ROBERT S. WALKER, HON. WILLIAM F. CLINGER, JR., HON. DONALD L. RITTER, HON. JAMES K. COYNE, HON. THOMAS M. FOGLIETTA, HON. EUGENE V. ATKINSON, AND HON. AUSTIN J. MURPHY.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the 1982 Pennsylvania congressional districts reapportionment statute, Act 42 of 1982, complies with the requirement of Article I, section 2 of the Constitution of the United States.

2. Whether Act 42 of 1982 violates rights protected by the First or Fourteenth amendments to the Constitution of the United States.

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MOTION TO DISMISS OR AFFIRM

Appellees Hon. Joseph M. McDade, Hon. Lawrence Coughlin, Hon. Gus Yatron, Hon. Bud Shuster, Hon. William F. Goodling, Hon. Robert S. Walker, Hon. William F. Clinger, Jr., Hon. Donald L. Ritter, Hon. James K. Coyne, Hon. Thomas M. Foglietta, Hon. Eugene V. Atkinson, and Hon. Austin J. Murphy, all of whom were incumbent members of the United States House of Representatives when this litigation was begun in 1982,[1] respectfully move to dismiss, or to affirm the judgment of the United States District Court for the Middle District of Pennsylvania in this case. Rule 16(1)(a), (c), and (d).

1. All of the appellees but Eugene V. Atkinson and James K. Coyne were reelected to Congress in November, 1982.

CONSTITUTIONAL PROVISIONS AND THE STATUTE INVOLVED

Article I, section 2 of the Constitution of the United States in pertinent part:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.
>
> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . .

Amendment I of the Constitution of the United States:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV, section 1 of the Constitution of the United States:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Pennsylvania congressional districts reapportionment statute, Act 42 of 1982, Pa. Stat. Ann. tit. 25 § 3571 (Purdon Legislative Service), is set forth as Appendix D to the Jurisdictional Statement.

COUNTER-STATEMENT OF THE CASE

In 1981, the Governor of Pennsylvania was advised by the President that, as a result of the 1980 census, Pennsylvania was entitled to 23 seats in Congress, two seats fewer than it held pursuant to the 1970 census. District Court Opinion, 2a.[2] Utilizing the official census data transmitted on March 25, 1981,[3] the Pennsylvania legislature considered various redistricting plans and ultimately adopted Act 42 of 1982, codified at Pa. Stat. Ann. tit. 25 § 3571 (Purdon Legislative Service). The full text of Act 42 is reproduced as Appendix D to the Jurisdictional Statement.

The legislative debates that culminated in Act 42 recognized that numerical equality of congressional districts, as a constitutional concern, was the "most salient" of the considerations that guided the Pennsylvania General Assembly. District Court Opinion, 5a. The districts established by Act 42 vary in average population by 253 persons. The percentage of deviation between the largest and smallest district is 0.2354%. If the revised census figures received in October are used, the districts vary in average population by 364 persons. The percentage of deviation between the largest and smallest districts is 0.399%. District Court Opinion, 3a-4a. The district court found that, whether the March or October figures are used, the extremely small degree of variance has no statistically relevant effect on relative representation among the districts created by Act 42. District Court Opinion, 17a.

2. The District Court opinion is reproduced as Appendix A to the Jurisdictional Statement and will be cited as "District Court Opinion" to the page in that Appendix.

3. Certain revised census data was transmitted to Pennsylvania in October, 1981. These revisions played no part in the legislative consideration of congressional redistricting plans. *See* District Court Opinion, 3a.

Of the four groups of plaintiffs that challenged Act 42 in the United States District Court for the Middle District of Pennsylvania, only the Westmoreland County municipal and county government officials have appealed the District Court's order of September 13, 1982, denying the requests for declaratory and injunctive relief and dismissing the complaints. These plaintiffs have contested the division of Westmoreland County into several congressional districts on partisan grounds and also complained that Act 42 did not achieve the numerical equality mandated by Article I, section 2 of the Constitution. District Court Opinion, 7a.

As noted above, the District Court found that Act 42 complied with the requirements of Article I, section 2. The District Court also flatly rejected the Appellants' other attack on Act 42, finding that it had no constitutional basis. District Court Opinion, 23a-24a.

ARGUMENT

Appellees McDade, et al., move to dismiss the appeal, or affirm the judgment of the district court that Act 42 of 1982, the Pennsylvania congressional districts reapportionment statute, is constitutional.

The two district court opinions, reproduced as Appendices A and B to the Jurisdictional Statement, demonstrate that the litigants and the court attended primarily to two claims about Act 42. First, Act 42 was asserted to be a violation of Article I, section 2 of the Constitution as it has been interpreted and applied by this Court in *Wesberry v. Sanders*, 376 U. S. 1 (1964), and its progeny, especially *Kirkpatrick v. Preisler*, 394 U. S. 526 (1969). The second principal claim was that Act 42 purposely minimized or cancelled out the voting potential of black voters. The present Appellants made no claim in the district court with respect to racial discrimination and have not raised that issue on appeal here. With respect to the first claim, that Act 42 has not achieved numerical equality, the Appellants have offered a cursory argument that the district court's decision in this case can only be sustained if *Kirkpatrick v. Preisler, supra*, is modified or abandoned. Jurisdictional Statement, 18.

The district court's decision is entirely consistent with *Kirkpatrick v. Preisler*, which requires the state to "make a good faith effort to achieve precise mathematical equality" in designing congressional districts. *Id.* at 530-31. The district court found that a certain degree of population variance among congressional districts has no statistically relevant effect on relative representation. District Court Opinion, 17a. This conclusion rests, in large part, on the sensible perception that the census figures upon which redistricting is based "are inherently less than absolutely accurate. Those who know about such things recognize this fact, and, unless they are to be wholly ig-

nored, it makes little sense to conclude from relatively minor 'census population' variations among legislative districts that any person's vote is being substantially diluted." *Gaffney v. Cummings*, 412 U. S. 735, 745-46 (1973), quoted at District Court Opinion, 12a-13a. The district court, while not making a finding as to the precise error in the 1980 census figures, accepted it to be at least one percent. District Court Opinion, 13a. The district court also echoed this Court's statement in *Gaffney v. Cummings* that the "census is more of an event than a process. It measures population at only a single instant in time. District populations are constantly changing . . . ." *Id.* at 746, quoted at District Court Opinion, 13a.

With respect to the degree of population variance among the districts created by Act 42, the district court was also guided by decisions in the litigation challenging the congressional redistricting plan adopted in New Jersey, *Daggett v. Kimmelman*, 535 F. Supp. 978 (D. N. J.), *stay denied sub nom. Karcher v. Daggett*, — U. S. —, 102 S. Ct. 1298, *probable jurisdiction noted*, — U. S. —, 102 S. Ct. 2955 (1982) (No. 81-2057). In granting a stay from the *Daggett* court's order disapproving the New Jersey plan, Justice Brennan wrote that he saw *Daggett* as "present[ing] the important question whether *Kirkpatrick v. Preisler* requires adoption of the plan that achieves the most precise mathematical exactitude, or whether *Kirkpatrick* left some latitude for the . . . legislature to recognize the considerations taken into account by it as a basis for choosing among several plans, each with arguably 'statistically insignificant' variances from the constitutional ideal of absolute precision." *Karcher v. Daggett*, 102 S. Ct. at 1299. *Daggett* involves a greater percentage of population variation (0.698%) than is present in this case. Justice Brennan saw "a fair prospect" that the decision holding that greater variation unconstitutional would be reversed. *Id.*, 102 S. Ct. 1300.

The district court found that Act 42 was consistent with the mandate of *Kirkpatrick v. Preisler* and sustained its constitutionality. District Court Opinion, 17a. This conclusion represents a sound coordination of the prior decisions of this Court in congressional redistricting cases. The Appellants have not presented any reasons why that conclusion should be disturbed. Further, because this Court will consider in *Daggett* an even greater degree of population variation (0.6984%), requiring the parties in this litigation to prepare briefs and present oral argument would under the circumstances be superfluous. Rule 16(1)(d).

The heart of the Appellants' presentation to this court is an argument that Act 42's division of Westmoreland County among several congressional districts is constitutionally inpermissible "gerrymandering." The Appellants would prefer to have "the advantages of a single congressman who would be sensitive to their needs." District Court Opinion, 22a. While stating that Westmoreland County was "the victim of gerrymandering," the district court found that splitting the county among different districts did not "amount to a constitutional violation." District Court Opinion, 23a. As the district court noted, this Court has often reminded the federal courts that "districting inevitably has sharp political impact and inevitably political decisions must be made by those charged with the task." *White v. Weiser*, 412 U. S. 783, 796 (1973); *see also, Gaffney v. Cummings, supra*, 412 U. S. at 753. Indeed, Appellants "do not dispute that political considerations are an integral part of redistricting." Jurisdictional Statement, 7. The Appellants also acknowledge that this Court has never established a constitutional limit on the extent to which political considerations can shape redistricting decisions, so long as numerically and racially equal districts result from the political process. *Id.*

The district court refused to remedy the complaints of the Westmoreland County plaintiffs "under the guise of finding constitutional deficiencies where none exist." It advised them that their remedy "lies in the ballot box, not in the federal court house." District Court Opinion, 24a.

Despite the district court's refusal to find that any constitutional violations were caused by the division of Westmoreland County among several congressional districts, the Appellants have advanced several theories in support of their argument that this division violates Article I, section 2, and the First and Fourteenth Amendments to the Constitution. It is their first contention that the division of Westmoreland County among several congressional districts impaired their right to vote. Jurisdictional Statement, 11. No explanation is offered how the subdivision of the County affects that right; in fact, most of the individual plaintiffs are members of the political party presumptively benefited by the "gerrymander."[4] Jurisdictional Statement, 9. Since an impact on party voting power is an acknowledged result of the reapportionment process, one would expect the Appellants to provide a measurement that would show when the political content of a reapportionment decision becomes constitutionally intolerable. They have not done so nor, it is submitted, can they do so. There is no evidence in the record of this litigation that the voting power of any of the Appellants has been nullified. Whatever the merits of their argument in the abstract, it has no application to this particular case.

The second theory advanced by the Appellants is that certain "natural" or "meaningful" relationships between congressmen and their constituents were disrupted

4. This Court should note that no plaintiff class has been certified and that the Appellants did not sue in any representative capacity. Jurisdictional Statement, ii.

by Act 42. Jurisdictional Statement, 12-13. Since the Constitution protects the relationship between congressmen and their constituents rather than relationships with municipalities, geographic areas, or purported socio-economic communities, the argument has no constitutional substance. The protection afforded by the First Amendment to the right of people to petition the government for a redress of grievances, cannot convert the desirability of "a meaningful relationship" between legislators and constituents into a constitutional standard. It is a legislative task to evaluate and provide for such meaningful relationships, to determine if they are desirable. This Court has acknowledged the primary jurisdiction of state legislatures in the reapportionment area and directed the federal courts not to intrude their judgment into these areas of policy. *See e.g., White v. Weiser, supra,* 412 U. S. at 795.

The third theory advanced by the Appellants is premised on the right to freedom of association protected by the First Amendment. Residence within a county boundary is not the type of "association" that this Court has recognized as deserving First Amendment protection. The associations that have received protection are voluntary associations, not "associations" resulting from an accident of geography. No extrapolation from cases like *Branti v. Finkel,* 445 U. S. 507 (1980); *NAACP v. Button,* 371 U. S. 415 (1963); *Shelton v. Tucker,* 364 U. S. 479 (1960); and *NAACP v. Alabama,* 357 U. S. 449 (1958), can yield a right in residents of a county to a single congressman.

The Appellants complain that the foregoing "important constitutional issues" were never considered by the district court. On the contrary, to the extent they were presented, they were rejected as having no constitutional content. None of them are substantial enough to warrant argument before this Court. Rule 16(1)(c). Alterna-

tively, because none of these latter issues legitimately raise federal constitutional questions, the appeal should be dismissed as to the matters addressed in the Jurisdictional Statement, 7-17, because they are not within this Court's jurisdiction. Rule 16(1)(a).

CONCLUSION

For the foregoing reasons, the appeal in this matter should be dismissed or, alternatively, the district court's decision should be affirmed.

Respectfully submitted,

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